SELECTED GUIDELINE APPLICATION DECISIONS FOR THE FIRST CIRCUIT

Prepared by the Office of General Counsel U.S. Sentencing Commission

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CHAPTER ONE: *Introduction and General Application Principles*

Part A Introduction

United States v. Bradstreet, 135 F.3d 46 (1st Cir.), *cert. denied*, 118 S. Ct. 1805 (1998). The district court erred in departing downward for aberrant behavior, where the defendant testified dishonestly at trial and was convicted of securities fraud. The court of appeals noted that an aberrant behavior departure is not warranted unless the conduct at issue is both a marked departure from the past and is unlikely to recur. One who testifies dishonestly after engaging in felonious dishonesty cannot credibly make either claim. One convicted of criminal dishonesty is therefore not entitled to an aberrant conduct departure if he has testified dishonestly about his criminal conduct.

Part B General Application Principles

§1B1.2 Applicable Guidelines

United States v. Garcia, 34 F.3d 6 (1st Cir. 1994). The district court did not err in applying USSG 2A2.2. The defendant pled guilty to assault of a federal officer in violation of 18 U.S.C. § 111. He argued that the district court incorrectly applied USSG 2A2.2 because his acceptance of responsibility negated the intent to cause bodily harm necessary for aggravated assault. The circuit court disagreed and found that the defendant's acceptance of responsibility was not conclusive that he lacked the requisite intent. Rather, the defendant's aiming the car at the officer supported the inference that he intended to cause bodily harm.

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

United States v. Austin, 239 F.3d 1 (1st Cir. 2001). The district court's inclusion of enhancements in the calculus of defendant's offense level under USSG 1B1.3 was not erroneous. The defendant argued that the state court had accounted already for the conduct upon which the enhancements were based. However, USSG 1B1.3 requires that courts consider all relevant conduct when calculating the offense level, including conduct upon which a previous sentence was based. Furthermore, the First Circuit had previously ruled that the sentencing guidelines had contemplated "multiple prosecutions for different offenses based on the same conduct" and permitted enhancements based on conduct underlying previous convictions. United States v. Hughes, 211 F.3d 676, 690 (1st Cir. 2000). The court affirmed this part of the sentence, ruling that, pursuant to USSG 1B1.3, the district court was required to include the enhancements when calculating the offense level.

United States v. Batista, 239 F.3d 16 (1st Cir. 2001). The court's use of the word "conspiracy" in describing transactions as reflected in the defendant's drug ledger was sufficient in establishing that ledger transactions were a part of the common scheme or plan of the defendant's offense of conviction as required under USSG 1B1.3(a)(2)).

United States v. Brandon, 17 F.3d 409 (1st Cir.), *cert. denied*, 513 U.S. 820 (1994). The defendants were convicted of bank fraud and conspiracy to commit bank fraud. They appealed the district court's determination of loss, claiming that the district court improperly assigned to each of them the entire amount of loss without regard to their individual degrees of participation in the conspiracy. The circuit court affirmed, holding that under USSG 1B1.3 it is possible for a defendant to join, and thus foresee and be held accountable for, the operation of the entire conspiracy.

United States v. Lacroix, 28 F.3d 223 (1st Cir. 1994). The district court did not err in including as relevant conduct the acts of the defendant's co-conspirators when determining the amount of loss under USSG 2F1.1. The defendant was convicted of conspiracy to defraud a federally insured financial institution in violation of 18 U.S.C. § 371. He argued that the district court misinterpreted the "accomplice attribution test" because it based its foreseeability finding on the defendant's "awareness" of his co-conspirator's activities. The circuit court concluded that awareness is germane to the foreseeability prong of the "accomplice attribution test" when that awareness is a knowledge of the nature and extent of the conspiracy in which the defendant is involved. The time from which the sentencing judge should determine foreseeability is the time of the defendant's agreement.

United States v. Marrero-Ortiz, 160 F.3d 768 (1st Cir. 1998). The district court erred by failing to make particularized findings of the quantity of drugs used to determine the defendant's base offense level under USSG 2D1.1. The defendant was convicted of a drug conspiracy under 21 U.S.C. §§ 841(a)(1) and 846. Although the evidence at trial showed that the defendant's role in the conspiracy was substantial, neither the district court nor the presentence report referred to any evidence to support assigning the defendant a base offense level of 38. The case was remanded for the court to make particularized findings on what quantity of drugs were attributable to the defendant.

United States v. Santos Batista, 239 F.3d 16 (1st Cir. 2001), *petition for cert. filed*, (May 7, 2001) (No. 00-10302). The district court did not err when it included in the sentencing calculus the drug quantities written in the ledger defendant was reviewing at the time of his arrest. Having been convicted of conspiracy and possession with intent to distribute cocaine, the defendant argued that the only drug quantity relevant to sentencing was that for which he was convicted. Section 1B1.3 mandates that the judge include all quantities that are "part of the same course of conduct or common scheme or plan as the offense of conviction." §1B1.3(a)(2). A "common scheme or plan" includes offenses "substantially connected to each other by at least one common factor." §1B1.3, comment. (n.9). Affirming the decision, the court found that the totality of the record demonstrated that the transactions described in the ledger and the offense of conviction shared a "common scheme or plan." Not only was the defendant holding the ledger in his lap when the police arrived, but the district court determined that the defendant was a member

of the conspiracy for which he was convicted during the times the transactions in the ledger were executed, establishing the "common factor" required under the guideline.

§1B1.5 Interpretation of References to Other Offense Guidelines

United States v. Conley, 186 F.3d 7 (1st Cir. 1999). The district court did not err in applying USSG 2A2.2 (aggravated assault) in sentencing the defendant for perjury and obstruction of justice. The defendant, a police officer, was convicted under 18 U.S.C. § 1623 and 18 U.S.C. § 1503 for lying before a grand jury investigating a beating of an undercover police officer by the defendant and other police officers who had mistaken the victim to be a fleeing suspect. The applicable guidelines are USSG 2J1.2(a) and 2J1.3(a). Because the defendant committed perjury "in respect to a criminal offense" and "obstructed the investigation or prosecution of a criminal offense," the court was required to apply USSG 2X3.1 (accessory after the fact) in respect to the criminal offense. Under USSG 2X3.1, the offense level must be "6 levels lower than the offense level for the underlying offense . . ." The district court found that the underlying offense was a civil rights violation of excessive use of force by the police. The court then applied USSG 2H1.1, the applicable guideline for an offense under 18 U.S.C. §§ 241 and 242. Under USSG 2H1.1, the base offense level is determined by the guideline applicable to the underlying offense. The court found that the underlying offense was aggravated assault and thus the applicable guideline was USSG 2A2.2. The cross-reference in USSG 2J1.2 applies even if the defendant lacks specific knowledge of the underlying offense and even if a defendant is not convicted as an accessory after the fact to the offense investigated. The defendant argued that aggravated assault was not the underlying offense because his conduct established by the convictions was for lying about observing the suspect. Cross-references serve to provide a "measure of gravity" for offenses such as perjury, obstruction of justice, and civil rights violations. A court is not limited to the conduct of the count of the conviction.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against The Person

§2A2.2 Aggravated Assault

United States v. Garcia, 34 F.3d 6 (1st Cir. 1994). The district court did not engage in impermissible double counting when it enhanced the defendant's sentence by four levels for use of a dangerous weapon pursuant to USSG 2A2.2(b)(2)(B). The defendant drove his car at a detective as he was approaching the defendant. He challenged the reliance on his use of the car as the basis for both the underlying predicate offense for the aggravated assault and the dangerous weapon enhancement. The circuit court, acknowledging a split among the courts of appeals, followed the Ninth Circuit in concluding that the use of a single factor to distinguish minor from aggravated assaults and then to distinguish among levels of seriousness is not impermissible double counting. *See* United States v. Reese, 2 F.3d 870 (9th Cir. 1993), *cert. denied*, 510 U.S. 1094 (1994); United States v. Newman, 982 F.2d 665 (1st Cir. 1992), *cert. denied*, 510 U.S. 812 (1993);

United States v. Williams, 954 F.2d 204 (4th Cir. 1992); *but see* United States v. Hudson, 972 F.2d 504 (2d Cir. 1992).

§2A6.1 Threatening or Harassing Communications

United States v. Freeman, 176 F.3d 575 (1st Cir. 1999). The district court did not err in denying the defendant a four-level reduction under USSG 2A6.1(b)(2), which applies "if the offense involved a single instance evidencing little or no deliberation." The defendant pled guilty to transmitting a threatening communication in interstate commerce under 18 U.S.C. § 875. The facts indicate that the defendant made a total of eight and at least two threatening phone calls to a hotline dedicated to locating missing children. The defendant's calls consisted of various statements about abducting, torturing, and sexually assaulting his stepdaughter. He continued to "update" the hotline operator. A "threat" is a communication that " a reasonable person (1) would take . . . as a serious expression of an intention to inflict bodily harm . . . and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation . . ." The district court did not err in concluding that eight phone calls in two days were more than a "single instance." Finally, the court did not err in finding that the defendant's conduct amounted to more than "little or no deliberation." The defendant looked up the number, spoke to the operator, remembered the contents of previous calls, and made up new ways to describe the torture.

Part B Offenses Involving Property

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft

United States v. Carrington, 96 F.3d 1 (1st Cir. 1996), *cert. denied*, 520 U.S. 1150 (1997). The circuit court affirmed the district court's calculation of loss under USSG 2B1.1 based on the market value of the items the defendant obtained. The defendant argued that the district court erred in its calculation of loss by relying on the values assigned by the presentencing report instead of using the actual amount of money that the defendant obtained in the sale and the fair wholesale value of the vehicles he bought. Under USSG 2B1.1, comment. (n.2), a product's fair market value is ordinarily the appropriate value of the victim's loss. The defendant noted, however, that market value is often difficult to ascertain and therefore, alternative methods of valuation should be employed. The appellate court rejected the defendants argument, and held that it was reasonable for the district court to calculate the market value of each vehicle as the price the defendant negotiated with each dealership. The appellate court joined the Sixth Circuit in equating the market value of a particular item with the price a willing buyer would pay a willing seller at the time and place the property was taken. *See* United States v. Warshawsky, 20 F.3d 204, 213 (6th Cir. 1994). Additionally, the court noted that it was proper for the court to adopt the retail, rather than the wholesale, value of the cars, since all the dealerships from whom the defendant obtained the cars were engaged in the retail sale of automobiles.

United States v. Coviello, 225 F.3d 54 (1st Cir. 2000), *cert. denied*, 121 S. Ct. 839 (2001). The district court did not err when it calculated the loss pursuant to USSG 2B1.1(b)(1) from the transfer of stolen property. The defendants either pled guilty or were convicted of charges of conspiracy to transport stolen property in interstate commerce, transportation of stolen

property, conspiracy to launder money and money laundering; one defendant was also convicted of structuring to evade reporting requirements to the Internal Revenue Service. The defendants participated in a scheme to sell Microsoft software stolen from KAO Infosystems, a computer disk manufacturer. Using Microsoft's wholesale prices, the district court assessed a loss based on the value of the property at the time it was taken from Microsoft. The defendants first argued that the district court should have calculated KAO's loss because the property was stolen from KAO, not Microsoft, and because KAO was required to compensate Microsoft for the lost disks. Rejecting the argument, the court found that Microsoft had a greater ownership interest in the property because Microsoft authorized all KAO distributions of its property and because the value of the property resided not in the plastic material of the disks, of which KAO had some ownership interest, but rather Microsoft's intellectual property located on the discs. Moreover, the district court appropriately used Microsoft's wholesale prices to calculate the fair market value of the loss, despite the fact that Microsoft sometimes distributed its products at cheaper prices through alternative channels, because no evidence indicated that Microsoft would have sold the stolen products through those alternative channels. The court also rejected the defendants' arguments that the price should have been discounted based on blemishes, the lack of legitimate licenses on the disks, and an absence of packaging materials. There was no evidence of defects or that customers had complained of defects; the absence of a license only shows that the disks were sold without Microsoft's consent, which is no basis for a discounted price; and any reduction of value for a lack of packaging would have no effect on the sentence because the property's value would have to be reduced by $7,000,000 to warrant an adjustment under §2B1.1. Finally, the fair market value of the property was the appropriate measure of the loss, as opposed to the replacement cost of the disks or the defendants' financial benefit. Application Note 2 to USSG 2B1.1, which provides for alternative measures of calculating loss, has applied to products that do not have market value, such as government documents; but, because the Microsoft products do have a market value, and a value that can be adequately calculated to provide a reasonable estimate required by USSG 2B1.1, the fair market value is appropriate to use.

United States v. Coviello, 225 F.3d 54 (1st Cir. 2000), *cert. denied*, 121 S. Ct. 839 (2001). The district court did not err when it enhanced the defendants' sentences by four levels under USSG 2B1.1(b)(4)(B) for being in the business of receiving and selling stolen property. The defendants either pled guilty or were convicted of charges of conspiracy to transport stolen property in interstate commerce, transportation of stolen property, conspiracy to launder money and money laundering; one defendant was also convicted of structuring to evade reporting requirements to the Internal Revenue Service. When considering this enhancement, the First Circuit required that the sentencing court consider "'the totality of the circumstances, with particular emphasis on the regularity and sophistication of a defendant's operation.'" *Id*. at 64 (quoting United States v. Richardson, 14 F.3d 666, 674 (1st Cir. 1994); *see also* United States v. McMinn, 103 F.3d 216, 222 (1st Cir. 1997); United States v. St. Cyr, 977 F.2d 698, 703 (1st Cir. 1992). The court found that the defendants' operation satisfied this standard. The illicit operation, which purchased more than 40,000 stolen CD-ROMs, back-up tapes, and compact disks, valued at more than $17,000,000, over the course of more than two years, involved several of the company's employees and produced substantial profits. The sophisticated fencing operation sold to several international and nonlocal buyers, filtering revenues through multiple bank accounts to avert attention. The court also ruled that the fact that the company also sold legitimate products did not preempt it from the enhancement, noting that such enterprises were cause for greater concern. The court rejected Rosengard's argument that the enhancement could not apply to him because he was

merely an employee of the company. Rosengard participated in most aspects of the operation, determining which products to purchase, receiving the stolen property, handling payments, and reselling the stolen goods. He also admitted to receiving about $20,000 for his dealings.

United States v. Duclos, 214 F.3d 27 (1st Cir. 2000). The district court's enhancement by two levels for minimal planning under USSG 2B1.1(b)(4)(A) was not clearly erroneous. A jury convicted the defendant of filing a false statement with the United States Postal Service, in violation of 18 U.S.C. § 1001, and obstructing correspondence, in violation of 18 U.S.C. § 1702. After the defendant's ex-girlfriend ended their relationship and resumed a relationship with another man, the defendant engaged in several acts to try to locate her. After finding his ex-girlfriend's new address, then determining that she was not receiving mail there, the defendant located the post office where she and her new boyfriend shared a post office box and figured out which box belonged to them. The defendant forged the new boyfriend's name on a change-of-address card and forwarded the mail from the post office box to his address. In an effort to avoid detection, he later destroyed the forwarded mail and attempted to cancel the forwarding request. On appeal, the defendant argued that his conduct should have been considered within the narrow scope of the act of filing the change-of-address card, as opposed to the district court's consideration of the entire plan. Siding with the district court, the First Circuit affirmed the enhancement based on the "extended course of conduct" and the defendant's "affirmative steps to cover up his crime." *Id.* at 32.

United States v. McMinn, 103 F.3d 216 (1st Cir. 1997). The district court erred in imposing a four-level sentence enhancement pursuant to USSG 2B1.1(b)(4)(B) for engaging in "the business of receiving and selling stolen property." The defendant argued that such an enhancement was impermissible unless a defendant was in the business of "receiving and selling property stolen by others." In the instant case, the defendant argued that the sentence enhancement did not apply to a defendant who makes a business of stealing property; that is, a professional "thief," as distinguished from a professional "fence." The government argued that the enhancement should be construed simply to require proof that the defendant's sales of stolen goods had a certain regularity or sophistication, urging the circuit court to adopt the totality of the circumstances test set forth in United States v. St. Cyr, 977 F.2d 698 (1st Cir. 1992). The circuit court rejected the government's interpretation as less consistent with the language, history, and purpose of the enhancement guideline. The First Circuit maintained that the plain language of the guidelines governing theft of property under USSG 2B1.1 and the guidelines on receiving stolen property under USSG 2B1.2, together with the evolution of the language employed in the enhancement guideline itself, tended to confirm that the Commission envisioned that "theft" alone did not constitute a "receiving" of stolen property for these purposes.

United States v. Richardson, 14 F.3d 666 (1st Cir. 1994). The defendant was convicted of conspiring to transport, possess, and sell stolen property. He argued that the evidence did not support the value given to the stolen property which resulted in a ten-level increase pursuant to USSG 2B1.1(b)(1)(K), and that the evidence did not support the finding that he was "in the business" of receiving and selling stolen property, which resulted in an additional four-level increase pursuant to USSG 2B1.2 (now §2B1.1, Nov. 1, 1993). The circuit court upheld the district court's determination of loss for USSG 2B1.1(b) purposes. According to Application Note

3, the sentencing court is only required to estimate the loss, given the available information. Under the facts of this case, that district court's finding was not clearly erroneous. The circuit court upheld the finding that the defendant was "in the business" of receiving and selling stolen property. The circuit court stated that there is "no bright line" rule for making such determinations, but the most important factors to consider on a case-by-case basis are the regularity of the defendant's dealings in stolen merchandise and the sophistication of the defendant's operation. Under the facts of this case, the defendant was easily classified as being "in the business" of dealing in stolen goods.

United States v. Walker, 234 F.3d 780 (1st Cir. 2000). The district court did not err when it calculated loss under USSG 2B1.1 based on the total amount embezzled by the defendant rather than the loss suffered by the victim. The defendant pled guilty to embezzlement under 18 U.S.C. § 664. Over a period of three years, the defendant made several withdrawals from his company's profit sharing plan, totaling $938,000, but ultimately left a shortfall of less than $500,000 because he had repaid some of the money during that time. The district court calculated the loss under USSG 2B1.1 based on the total amount embezzled and not the actual shortfall. Consistent with Second Circuit interpretation of a similar loss provision in the fraud guideline, the court affirmed the district court decision. *See* United States v. Brach, 942 F.2d 141, 143 (2d Cir. 1991) (affirming a wire fraud sentence based on a loss calculation that "included the value of all property taken, even though all or part of it was returned"). Each illegal withdrawal constituted an act of embezzlement. Regardless of repayment, each time the defendant unlawfully withdrew money, he risked the business's ability to maintain its financial obligations. The court added that the defendant's acts of repayment could be grounds for departure under other guidelines.

§2B3.1 Robbery

United States v. Austin, 239 F.3d 1 (1st Cir. 2001). The district court erred when it included the value of a stolen car as a robbery-related loss for purposes of enhancing the defendant's sentence under USSG 2B3.1. The defendant was convicted of various state and federal charges stemming from a bank robbery that ended in a high-speed car chase and a house invasion. Based on a loss calculation that included the value of a car stolen on the morning of the bank robbery, the district court raised the offense level under USSG 2B3.1(b)(7). The court held that despite the fact that the defendant stole the car to provide transportation for the bank robbery, the car theft and the bank robbery were too disparate for the value of the car to be included in the loss from the bank robbery. "[T]he two offenses [were] not a continuous event and [were] somewhat attenuated." *Id*. at 7. Furthermore, "robbery is only secondarily about value," and the value of the car was the only link established at sentencing between the car theft and the bank robbery. The court ruled that the one-level enhancement based on a loss calculation that included the value of the car was erroneous and vacated that part of the sentence.

United States v. Gray, 177 F.3d 86 (1st Cir. 1999). The district court did not err in finding that the defendant made a threat of death during a robbery that warranted application of a two-level enhancement under USSG 2B3.1(b)(2)(F). During the robbery in question, the defendant, who did not have a gun, handed the teller a note which read "Give me all your money or I'll start shooting," and told the teller "that he was not playing a prank." After the teller relinquished cash, the defendant apologized. A defendant need not explicitly communicate an intent to kill to be subject

to the enhancement. *See* §2B3.1, comment. (n. 6). The test is whether the defendant's conduct would instill in a reasonable person a fear of death. The circumstances of this case indicate that the defendant threatened to use a lethal weapon. The teller had no way of knowing that the defendant did not actually possess a gun.

§2B3.2 Extortion by Force or Threat of Injury or Serious Damage

United States v. Hughes, 211 F.3d 676 (1st Cir. 2000). The district court properly sentenced the defendant under USSG 2A1.1, the first degree murder guideline, cross-referenced under USSG 2B3.2(c)(1). A jury convicted the defendant of attempted extortion, in violation of 18 U.S.C. § 1951, after the defendant murdered the president of the software company for which he worked, then told the company's management that the president had been kidnapped and was being held for ransom. He refused to inform management of the location for the exchange and attempted to exact the ransom money from the company to complete the exchange alone. The defendant was convicted of the company president's homicide in Mexico. The defendant first argued that USSG 2B3.2(c)(1) was superceded by 18 U.S.C. § 1119, which prohibited prosecution under section 1111 of United States nationals who kill other United States nationals outside the United States "'if prosecution has been previously undertaken by a foreign country for the same conduct.'" 211 F.3d at 690 (quoting Section 1119). Rejecting the argument, the court noted that the defendant was prosecuted and punished under the extortion statute (section 1951), not under section 1111, and that section 1119 prohibits prosecutions, not sentencing enhancements. Furthermore, the Supreme Court permits the enhancement of sentences based on acts underlying previous prosecutions, including situations where "the defendant is subject to '*separate prosecutions* involving the same or overlapping "relevant conduct."'"[1] *Id.* (quoting Witte v. United States, 515 U.S. 389, 404 (1995)). The court next rejected the defendant's argument that the district court should have found that he committed voluntary manslaughter instead of murder, thus precluding the application of USSG 2B3.2(c)(1). The evidence that the defendant "purchased a gun, devised a plan to transport it to Mexico, surveyed the area of the crime to choose a suitable location to kill [the decedent], and planned for [the decedent] to arrive late at night" supported a finding of murder. Finally, the court rejected the defendant's argument that USSG 2B3.2(c)(1) only applies if the extortion victim, here the software company, dies. Drawing an analogy to USSG 2B3.2's multiple-victim enhancement provision, the court found that despite the defendant's failure to demand money from the decedent, the decedent was still a victim of the defendant's attempted extortion. USSG 2B3.2 identifies "a plan to derail a passenger train or poison consumer products" as examples of extortion schemes for which a multiple-victim enhancement is warranted. USSG 2B3.2, comment. (n.7). Moreover, other provisions that include the term "victim" support the district court's decision. Section 2B3.2(b)(2), which addresses "excessive 'loss to *the victim*,'" represents a narrowly defined class of victims because only the target of an extortion can suffer the excessive financial loss discussed in the guideline; on the other hand, §2B3.2(c)(1), which uses the article "a" to precede "victim," refers to a larger class of victims. 211 F.3d at 691. The Fifth Circuit similarly construes the term "victim" when applying a cross-reference guideline. *See* United States v.

[1]The citation for the quotes around the term "relevant conduct" are omitted in the case, but likely refers to the §5G1.3. The court then adds that §5G1.3(c) provides for "multiple prosecutions for different offenses based on the same conduct." *Id.* at 690.

Harris, 104 F.3d 1465, 1474-75 (5th Cir. 1997) (applying §2B3.2(c)(1) where an individual was killed as a result of a robbery, but was not the target of the robbery). The court affirmed the sentence.

§2B4.1 Bribery in Procurement of Bank Loan and Commercial Bribery

United States v. Wester, 90 F.3d 592 (1st Cir. 1996). The district court erred in calculating loss under USSG 2B4.1 based upon the defendant's release from personal liability on a $12.4 million NEFR loan (obtained in exchange for arranging the $2.3 million loan to his partners in a land development project). The defendant made the following arguments for excluding the value of the $12.4 million loan from the loss calculation: 1) the $12.4 million should not be considered because the $2.3 million loan was not a quid pro quo, and 2) the valuation of the release at $12.4 million was incorrect because this represented the full amount of the loan. The court rejected the defendant's first argument, but accepted his second argument. The commentary to the sentencing guidelines indicates that the face value of the loan is not necessarily an appropriate figure to use for the purpose of calculating loss because, depending upon the circumstances, the value of a loan may be no greater than the difference in the interest rate obtained through the bribe. At least one court has found that "the value of a transaction is often quite different than the face amount of that transaction." United States v. Fitzhugh, 78 F.3d 1326, 1331 (8th Cir.), *cert. denied*, 117 S. Ct. 256 (1996). The court concluded that it was plain error for neither the parties nor the probation officer to make any attempt to estimate reasonably the value of the release.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

United States v. Boot, 25 F.3d 52 (1st Cir. 1994). Chapman v. United States, 500 U.S. 453 (1991), held that the entire weight of the carrier medium must be used to determine the amount of LSD attributable to a defendant. Subsequent to this ruling, Amendment 488 became effective, prescribing a 0.4 milligram per-dose formula in calculating LSD quantity. The defendant argued that Congress, by permitting Amendment 488 to take effect, was establishing a unitary per-dose "mixture and substance" formula for calculating LSD weight in both statutes containing mandatory minimum sentencing provisions and guideline sentencing range sentences. In deciding this issue of first impression, the circuit court held that "Chapman governs the meaning of the term `mixture or substance' in 21 U.S.C. § 841(b)(1)(B)(v)." The amendment to the guideline did not override the applicability of that term for the purpose of applying any mandatory statutory sentence.

United States v. Brassard, 212 F.3d 54 (1st Cir. 2000). The district court properly calculated the defendant's sentence under USSG 2D1.1. A jury convicted the defendant of possession with intent to distribute cocaine and use of a firearm during and in relation to a drug trafficking offense after law enforcement trapped the defendant in a reverse sting operation. The defendant argued that because he could not have purchased the quantity of drugs to which he had agreed, the district court should have "'exclude[d] from the offense level determination the amount of the controlled substance that . . . he . . . was not reasonably capable' of purchasing." *Id*. at 58 (quoting §2D1.1, comment. (n.12) (correction in original). The court ruled that the sentence above does not apply to the defendant's situation and identified the applicable sentence from the same application note. "'[I]n a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense . . . .'" §2D1.1, comment. (n.12).

United States v. Charles, 213 F.3d 10 (1st Cir.), *cert. denied*, 121 S. Ct. 272 (2000). The district court properly sentenced the defendants based on the total weight of the crack cocaine under USSG 2D1.1. The defendants argued that not only did the government not introduce sufficient scientific evidence regarding the melting point or water solubility of the seized substance to show that it constituted crack cocaine, but that the purity of the cocaine base involved in the offense was too low to constitute crack cocaine under USSG 2D1.1(c). Rejecting both arguments, the court affirmed the sentence. First, the only scientific evidence required by the First Circuit is evidence "'proving that, chemically, the contraband was cocaine base' ... the government [can] bridge the evidentiary gap between cocaine base and crack cocaine by presenting lay opinion evidence . . . from 'a reliable witness who possesses specialized knowledge' (gained, say, by experience in dealing with crack or familiarity with its appearance and texture)." United States v. Martinez, 144 F.3d 189, 190 (1st Cir. 1998) (quoting United States v. Robinson, 144 F.3d 104, 108-09 (1st Cir. 1998); *see also* United States v. Ferreras, 192 F.3d 5, 11 (1st Cir. 1999), *cert. denied*, 528 U.S. 1130 (2000). The government did not have to introduce evidence about the melting point or water solubility of the contraband because two chemists had already introduced evidence proving that the seized substances were cocaine base. The trooper's testimony regarding its appearance and consistency sufficiently determined that the substance was crack cocaine. Furthermore, the Supreme Court has established that a drug's purity level is irrelevant to

sentencing. "'Congress adopted a 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence.'" 213 F.3d at 25 (quoting United States v. Chapman, 500 U.S. 453, 461 (1991)). The guidelines adopt this policy, stating that "the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." §2D1.1(c), Note A.

United States v. Gomes, 177 F.3d 76 (1st Cir.), *cert. denied*, 528 U.S. 911 (1999). The district court did not err in finding the defendant accountable for an agreed-upon quantity of one kilo of cocaine for a deal never made rather than an ounce sample provided during negotiations. The defendant helped find a supplier for an informant posing as a drug purchaser. Prior to meeting with the supplier and the defendant, the informant stated that he wanted to purchase a kilo of cocaine. When the three met, the informant stated that he wanted an ounce sample "before I buy a brick." The supplier stated that a kilo or more was a better bargain, but the informant insisted on purchasing only an ounce. The kilo sale was never made. Citing the example in application note 12 to USSG 2D1.1, the defendant argued that the delivered amount rather than the amount agreed-upon should be used to determine the offense level. The judge did not find that the lesser amount "more accurately represented the scale of the offense," because the defendant did conspire with the supplier to make a kilo sale. The only reason the sale did not take place was because the informant did not accept the full amount.

United States v. Manzueta, 167 F.3d 92 (1st Cir. 1999). The defendant pled guilty to possession with intent to distribute of 57.9 grams of crack cocaine. At sentencing, the defendant argued that cocaine base is not scheduled as a controlled substance and that the penalties for crack cocaine are disproportionate to those for powder cocaine. The circuit court rejected both arguments finding that crack, a form of cocaine base, is covered by the statute and Congress intended to provided higher penalties for crack.

United States v. Mateo-Sanchez, 166 F.3d 413 (1st Cir.), *cert. denied*, 119 S. Ct. 2060 1999). The district court did not err in finding two of five defendants accountable for the entire amount of cocaine involved in the conspiracy. The defendants were present at the site of a drug drop involving five or six individuals carrying sacks of cocaine and four vehicles. The defendants argued that 380 kilograms of cocaine was too large an amount to be foreseeable. The facts suggest that this was a large-scale operation and therefore it was proper to attribute to the defendants the entire amount of cocaine.

United States v. Padro Burgos, 239 F.3d 72 (1st Cir.), *cert. denied*, 121 S. Ct. 2259 (2001). The district court did not err when it imposed a life sentence under §2D1.1. The defendant had been convicted of conspiracy to distribute heroin and cocaine, in violation of 21 U.S.C. § 846, and of using a firearm in relation to a crime of violence and aiding and abetting, under 18 U.S.C. § 924(c)(1). The court sentenced the defendant to life imprisonment under §2D1.1(d)(1), which requires the application of the First Degree Murder Guideline (§2A1.1) when deaths occur under circumstances constituting murder in violation of 18 U.S.C. § 1111. The court rejected defendant's argument that the district court failed to make detailed findings regarding the quantity of drugs attributable to him. Because the sentence was based on the fact that deaths had occurred, and not the quantity of drugs, the court found that any failure to make such findings was

harmless. The court also rejected the defendant's argument that the murders should not have driven his sentence because they were not separately charged or proven beyond a reasonable doubt. Under USSG 2D1.1(d)(1), the murders need only be proven by a preponderance of the evidence. The sentence was affirmed.

United States v. Raposa, 84 F.3d 502 (1st Cir. 1996). The circuit court declined to decide the question of whether the Fourth Amendment exclusionary rule was applicable in the context of guideline sentencing proceedings. The court upheld the sentence imposed by the district court based solely on the conclusion that it was adequately supported by the facts established in the unobjected-to portions of the presentence report. The defendant argued that the district court erroneously included as "relevant conduct" his possession of a substantial quantity of cocaine that the court had earlier suppressed as the product of an illegal search. The district court held that the defendant's possession of the cocaine found at his apartment constituted "part of the same course of conduct . . . as the offense of conviction pursuant to USSG 1B1.3(a)(2)." The district court, relying on cases from other circuits, held that the exclusionary rule did not apply in the sentencing context. *See* United States v. Tejada, 956 F.2d 1256, 1262 (2d Cir.), *cert. denied*, 506 U.S. 841 (1992); United States v. Torres, 926 F.2d 321, 325 (3d Cir. 1991); United States v. Nichols, 979 F.2d 402, 410-11 (6th Cir. 1992). The appellate court declined to decide this case based on this issue because it did not think that the case presented a proper occasion to decide such an important question. Instead, the court held that the exclusionary rule did not bar the district court from considering the defendant's own voluntary statements included in the presentence report. The portion of the presentencing report that recounted the defendants statements, to which he declined to object, provided an independently sufficient ground for the district court's finding at sentencing that the defendant possessed the cocaine at issue.

United States v. Rodriguez, 215 F.3d 110 (1st Cir. 2000), *cert. denied*, 121 S.Ct.1658 (2001). The district court did not err when it enhanced the defendant's sentence by two levels under §2D1.1(b)(2)(B) for acting as a captain aboard a vessel carrying a controlled substance. The defendant was convicted of conspiracy to import more than 5,000 pounds of marijuana, in violation of 21 U.S.C. § 952(a) and 21 U.S.C. § 963, as well as attempting to import more than 5,000 pounds of marijuana, in violation of 21 U.S.C. § 952(a), 21 U.S.C. § 963, and 18 U.S.C. § 2. The court found irrelevant the defendant's argument that the enhancement only applies to people actually convicted of importation of drugs. Section 2X1.1 mandates that the offense level for conspiracy and attempt include "'*any adjustments from* [*the substantive offense*] *guideline* for any intended offense conduct that can be established with reasonable certainty.'" *Id*. at 124 (quoting §2X1.1(a)). Section 2D1.1 is not excepted from these adjustments and thus must be applied in cases of conspiracy and attempt to commit drug offenses.[2] The sentence was affirmed.

United States v. Sanchez, 81 F.3d 9 (1st Cir.), *cert. denied*, 519 U.S. 878 (1996). The circuit court held that Amendment 515 which added a new subsection (4) to guideline §2D1.1(b) would not be applied retroactively. Section 2D1.1(b)(4) states that if a defendant meets the requirements of §5C1.2 and has an offense level of 26 or greater, the sentence will be decreased

[2]The defendant did not argue that §2D1.1(b)(2)(B) could not be established with reasonable certainty; therefore, the issue was not addressed.

by two levels. The circuit court noted that guideline amendments are applied retroactively if they clarify a guideline but are not retroactive if they substantively change a guideline. *See* United States v. LaCroix, 28 F.3d 223, 227 (1st Cir. 1994). The circuit court concluded that Amendment 515 is substantive because "[i]t added an additional and wholly new part to Guideline §2D1.1(b)." Furthermore, the circuit court noted that the Sentencing Commission did not consider this amendment to be retroactive as it was not included in §1B1.10(c).

United States v. Singleterry, 29 F.3d 733 (1st Cir.), *cert. denied*, 513 U.S. 1048 (1994). The district court did not err when it rejected defendant's argument that stiffer penalties for cocaine base offenses (*e.g.*, "crack") as opposed to cocaine powder offenses, violate the defendant's right to equal protection under the law. At the district court, the defendant offered evidence to demonstrate that the sentencing distinction between cocaine base and cocaine powder is either irrational, racially motivated, or both. On appeal, the defendant argued that the district court erroneously applied the relevant constitutional principles at the sentencing hearing. The First Circuit disagreed, and held that "Congress had before it sufficient . . . information to make distinctions that would justify . . . more severe sentences for trafficking in or using cocaine base or crack than cocaine itself." United States v. Frazier, 981 F.2d 92, 95 (3d. Cir. 1992), *cert. denied*, 507 U.S. 1010 (1993). Furthermore, the First Circuit held that there are "racially neutral grounds for the classification that more plausibly explain" its impact on blacks; thus, there is insufficient evidence "that the distinction drawn between cocaine base and cocaine was motivated by any racial animus or discriminatory intent on the part of either Congress or the Sentencing Commission." Frazier, 981 F.2d at 95.

Part E Offenses Involving Criminal Enterprises and Racketeering

§2E2.1 Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means

United States v. Cunningham, 201 F.3d 20 (1st Cir. 2000). The district court did not err when it enhanced the defendant's sentence by four levels under USSG 2E2.1(b)(3)(A) for abduction in order to facilitate the commission of an offense. The defendant pled guilty to racketeering conspiracy, racketeering, making an extortionate extension of credit, collecting an extortionate extension of credit with extortionate means, conspiring to use extortionate means to collect a debt, and operating an illegal gambling business. Electronic surveillance tapes recorded statements by the defendant about his assault of a man who had defaulted on a loan owed to the defendant. Conflicting statements from the tapes revealed that he either followed his victim from a wake to a restaurant, behind which he assaulted the man, or, as the defendant argued, he tricked his victim into going to the restaurant by telling him that a long-time friend wanted to meet him there. Rejecting the defendant's argument that when he took his victim behind the restaurant, he displayed none of the physical force necessary to constitute an abduction, the court joined other circuits when it ruled that the force required by under USSG 2E2.1(b)(3)(A) need not be violent or physical. *See* United States v. Saknikent, 30 F.3d 1012, 1014 (8th Cir. 1994) (finding that "the abduction adjustment requires only that force necessary to overcome the particular victim's will" is sufficient); *see also, e.g.*, United States v. Romero, 189 F.3d 576, 590 (7th Cir. 1999), *cert. denied*, 529 U.S. 1011 (2000) (holding that under USSG 2A3.1(b)(5), kidnapping through inveiglement constituted abduction). Moreover, the court found that a narrow interpretation of

force under USSG 2E2.1(b)(3)(A) would constitute ineffective policy because "[a]n abduction accomplished by use of threat and fear carries the same dangerous consequences as an abduction accomplished by use of physical force . . . ." *Id*. at 28.

Part F Offenses Involving Fraud or Deceit

§2F1.1 Fraud and Deceit

United States v. Chapman, 241 F.3d 57 (1st Cir. 2001). The district court did not err when it enhanced the defendant's sentence under USSG 2F1.1 for more than minimal planning. The defendant pled guilty to one count of bank fraud. The enhancement applies to an offense that involved "repeated acts over a period of time, unless it is clear that each instance was purely opportune." §1B1.1, comment. (n.1(f)). The court rejected the defendant's argument that his actions did not satisfy the standard under USSG 2F1.1 because they were "impulsive and opportunistic," and found that the fraudulent deposits and withdrawals over the course of two days was not "'spur of the moment conduct, intended to take advantage of a sudden opportunity.'" 241 F.3d at 62 (quoting United States v. Rust, 976 F.2d 55, 57 (1st Cir. 1992)) (defining conduct that is purely opportune).

United States v. Chorney, 63 F.3d 78 (1st Cir. 1995). The district court did not err in its loss calculation under USSG 2F1.1. The defendant engineered a false appraisal of silver dollars, and was convicted of seven counts of making false statements or reports to a federally insured bank. The district court sentenced the defendant to twenty-seven months imprisonment, followed by three years supervised release, and ordered him to pay $569,469 in restitution to the FDIC. The district court arrived at the $569,469 figure by reducing the amount of the unpaid loan ($2.5 million) by the value of the silver dollars and other assets that the defendant had pledged to secure the loan; and then, the court subtracted the value of unpledged silver dollars ($336,951) that had been seized from the defendant. The defendant unsuccessfully argued that the court should have subtracted the value of the unpledged silver dollars on the date of the discovery of the fraud ($590,602.30) which would reduce his restitution by over $200,000. The district court actually valued the silver dollars from an amount that was in-between the amount the government thought was appropriate (value at time of sentencing) and the value at time the fraud was discovered. The circuit court affirmed the amount computed by the district court and stated that it is the illegal transaction that is to be appraised—not the defendant's overall wealth—and no reason was provided here to make an exception. The circuit court noted that to give the defendant credit for other, unpledged assets is simply a free ride for the wealthy defendant and wholly at odds with the underlying purpose of the guideline.

United States v. Kelley, 76 F.3d 436 (1st Cir. 1996). The district court did not err in calculating the amount of loss under §2F1.1. The Small Business Administration (SBA) loaned the defendant $55,100, secured by mortgages on his commercial boat and home. In the course of applying for this disaster relief and on a subsequent Progress Report, however, the defendant had made various false statements regarding the purchase of the vessel. The circuit court found that the formula set forth in USSG 2F1.1, comment. (n.7(b)), which applies to fraudulent loan procurement cases, was applicable to this case. The commentary states that the court should take "the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending

institution has recovered (or can expect to recover) from any assets pledged to secure the loan." With respect to the valuation of the house, the defendant asserts that he should be credited with the amount he could have obtained if he had sold the house himself. The circuit court found, however, that USSG 2F1.1, comment. (n.7(b)) clearly states that the value of the loss is to be offset by the amount the lender could expect to recover on the collateral. As this represents the approach implemented by the district court, the circuit court affirmed the district court's determination as to the amount of loss.

United States v. Reeder, 170 F.3d 93 (1st Cir.), *cert. denied*, 1999 WL 495905 (U.S. Oct. 4, 1999). The district court did not err by calculating the base offense level under §2F1.1 using the entire loss sustained by the victim, including losses the victim sustained as a result of causes extraneous to the defendant's criminal conduct. A defendant in another case set up a shell corporation to buy insurance companies, and the defendant, a real estate developer, agreed to contribute capital in exchange for shares of the company. All of the properties owned by the defendant, that were used as collateral to secure promissory notes to capitalize the acquired insurance companies, had preexisting liens.

United States v. Stein, 233 F.3d 6 (1st Cir. 2000), *cert. denied*, 121 S. Ct.1406 (2001). The district court did not err when it imposed a six-level increase to the offense level based on an intended loss calculation, pursuant to USSG 2F1.1. The defendants were convicted of bankruptcy fraud and conspiracy to commit bankruptcy fraud, in violation of 18 U.S.C. §§ 152 and 371. The district court identified the intended loss as the net gain (after paying the mortgage, taxes, and the brokerage commission) from the sale of the property which the defendants failed to disclose to creditors after filing for bankruptcy. The defendants argued that the calculation failed to account for the carrying costs they paid during their ownership, thus allowing the creditors to benefit from the rise in the property value during that time. The Sentencing Guidelines do not provide a formula for determining the loss in bankruptcy proceedings, requiring only that the sentencing court "make a reasonable estimate of the loss, given the available information." §2F1.1, comment. (n.8). Affirming the district court calculation, the court ruled that the immediate value from exclusive control of the property (*i.e.*, the ability to enjoy it personally or profit from it financially) during the period that the defendants concealed it from their creditors offset the carrying costs. The district court also appropriately calculated the loss from the time the defendants sold the property rather than from the bankruptcy filing date because the concealment continued through the time of the sale.

Part K Offenses Involving Public Safety

§2K1.4 Arson; Property Damage by Use of Explosives

United States v. Disanto, 86 F.3d 1238 (1st Cir. 1996), *cert. denied*, 520 U.S. 1105 (1997). The district court correctly applied USSG 2K1.4(a)(1), the higher of two offense levels under the arson guideline, when computing the defendant's sentence and did not err in its findings that he "knowingly" created a substantial risk of death or bodily injury. The defendant argued that the district court should have applied USSG 2K1.4(a)(3), which requires computation of the base offense level as 2 plus the base offense level for "Fraud and Deceit." He contended that the overwhelming evidence at trial established that his primary purpose in setting the fire was to

defraud the insurance company, not to create a substantial risk of serious bodily injury to bystanders. Similarly, the defendant argued that the district court's findings that he "knowingly" created this risk was not supported by a preponderance of the evidence. The appellate court disagreed, and held that the district court correctly applied USSG 2K1.4(a)(1) because it yielded the highest base offense level, based on its findings that the defendant had created a substantial risk of bodily injury. The circuit court treated the issue of whether the defendant knowingly created that risk within the meaning of USSG 2K1.4 as one of first impression, in that the court had not previously determined what level of knowledge was required under USSG 2K1.4(a)(1)(A). The circuit court applied a two-prong test: (1) whether the defendant's actions created a substantial risk; and (2) whether the defendant acted knowingly to create that risk. Relying upon the PSR, the circuit court held that the defendant clearly created a substantial risk by causing a potential for a fuel air explosion. The fact that fortuitously no one was injured and extensive damage did not result, did not mean that the defendant did not endanger others. Additionally, the First Circuit adopted the definition of "knowledge" as outlined in the Model Penal Code which requires that the defendant be "aware that a substantial risk of death or bodily injury is `practically certain' to result from the criminal act." The circuit court held that the method used to set the fire and the defendant's timing satisfied the `practically certain' standard.

United States v. Ruiz, 105 F.3d 1492 (1st Cir. 1997). On appeal, the government argued that a base offense level of 24 was warranted because under the first prong of USSG 2K1.4(a)(1), the defendants had only to knowingly, not intentionally, create the risk of death or injury. Moreover, the government argued that the defendants satisfied the knowingly requirement because they committed arson at a time when they knew residents were in the very building to which they set fire. The defendant's argued that the district court properly applied a base offense of 20 because it was inconceivable that they would intentionally create a substantial risk of death or serious bodily injury to their family members and they did not destroy or attempt to destroy a dwelling but rather, a store. The district court had interpreted "knowingly" as "intentionally" and thus concluded that the defendants intentionally put his brothers in danger.

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

United States v. Arias, 14 F.3d 45 (1st Cir.) (Table, Text in Westlaw, No. 93-1624), *cert. denied*, 511 U.S. 1058 (1994). The district court properly applied the cross-reference provision of USSG 2K2.1 based on the defendant's use of a firearm in connection with an attempted murder. The defendant first challenged the Commission's authority to punish state crimes by way of the cross- reference. The court followed other circuits and concluded that USSG 2K2.1 applies to both state and federal offenses. The defendant then argued that the district court erroneously applied the guideline for murder because his conduct only amounted to an attempted assault. The district court found that the defendant threatened to kill the victim and then returned with a sawed-off shotgun which the defendant subsequently discharged; the cross-reference to the murder guideline was not clearly erroneous.

United States v. Brown, 169 F.3d 89 (1st Cir. 1999). The district court's application of a two-level increase under USSG 2K2.1(b)(4) was not double-counting, even though the defendant was convicted of possession of a stolen firearm under 18 U.S.C. § 922(j). The base offense level

takes into account the stolen nature of the firearm if "(1) the only offense to which USSG 2K2.1 applies for a given defendant is 18 U.S.C. § 922(j), and (2) the defendant's base offense level is determined under subsection (a)(7)." *Citing* §2K2.1, comment. (n. 12). Here, the defendant's base offense level was calculated under subsection (a)(2), based on at least two prior felony convictions of either violent crimes or drug crimes.

United States v. Damon, 127 F.3d 139 (1st Cir. 1997). The district court erred in determining that the defendant's prior conviction for aggravated criminal mischief was a crime of violence. The court of appeals held that, under the Supreme Court's categorical approach to the nature of the crime set forth in Taylor v. United States, 495 U.S. 575 (1990), it was error for the district court to look at the facts of the offense. Instead, the court should have looked at the statutory definition of aggravated criminal mischief. Damon was convicted under a subsection that prohibited damaging or destroying property in an amount exceeding $2,000 in order to collect insurance proceeds. The court of appeals noted that, under Taylor, this qualifies as a crime of violence if and only if a serious potential risk of physical injury to another is a normal, usual, or customary concomitant of the predicate offense as set forth in the statute. The court of appeals held that the offense did not necessarily involve a serious potential risk of physical injury to another. The government argued that Damon set fire to the house, and that arson does pose such a risk. The court of appeals agreed that arson posed such a risk, but stated that arson is a separate crime, and simply causing damage to property does not require the damage to be done by arson. According to the court, there are many easy ways to cause $2,000 in property damage which do not risk physical injury to others. Thus, the typical conduct reachable under the statute of conviction does not involve a serious potential risk of physical injury to another; the inquiry is limited to the "usual type of conduct that the statute purposes to proscribe" and does not explore "the other limits of the statutory language or the myriad of possibilities girdled by that language." The district court was precluded under Taylor from looking into the nature of the predicate offense.

United States v. DeLuca, 17 F.3d 6 (1st Cir. 1994). The district court correctly determined the defendant's base offense level based on his prior crime of violence pursuant to §2K2.1(a). The defendant challenged the enhancement because the government failed to identify the nature of the threat which formed the basis of his prior state conviction for extortion. According to the defendant, the guidelines limit "extortion" to conduct which threatens another person while the state statute under which he was convicted reached "threats against the reputation, property or financial condition of another." R.I. Gen. Laws § 11-42-2. Since the government did not identify the nature of the threat, it failed to prove that he committed "a crime of violence." The First Circuit rejected this argument. First, the guidelines specifically list extortion as a crime of violence. There is no requirement that the crime must involve a threat against another person. Although the federal definition of "extortion" has a single, invariant meaning, that definition is not limited to the parameters of the Hobbs Act, 18 U.S.C. § 1951, as the defendant asserted. The court of appeals found that the state statute's broad definition of extortion fell well within the reach of USSG 4B1.2(1)(ii). Second, even if the sentencing court were limited by the definition of extortion found in the Hobbs Act, the fear element could be met not only by threats against the person, but also threats of economic harm. Although the state statute did not mirror the Hobbs Act verbatim, the two laws are sufficiently similar to discredit the defendant's argument. Third, although the guidelines are not statutes, principles of statutory interpretation still apply. Generally, "no construction should be adopted which would render statutory words or phrases meaningless,

redundant or superfluous." Lamore v. Ives, 977 F.2d 713, 716-17 (1st Cir. 1992). The defendant's argument that the guidelines limit extortion to threats of bodily harm would render the specific reference in USSG 4B1.2(1)(ii) superfluous since that guideline clearly makes any prior crime that "has as an element the threatened use of physical force against the person of another" a crime of violence. §4B1.2(1)(i). Finally, the defendant's reliance on United States v. Anderson, 989 F.2d 310 (9th Cir. 1993) was unpersuasive. The Anderson court found that the defendant's prior conviction for attempted extortion did not fall within the scope of the Armed Career Criminal Act because that statute only reaches completed acts. *Id*. at 313. However, unlike the ACCA, the guidelines definition of "a crime of violence" specifically includes attempts to commit such an offense. §4B1.2, comment (n.1).

United States v. Peterson, 233 F.3d 101 (1st Cir. 2000).[3] The district court did not err when it enhanced the defendant's sentence by four levels under USSG 2K2.1(b)(5) for possession of a firearm in connection with another felony offense, after the defendant was convicted of narcotics and firearms violations. Broadly construing the phrase "in connection with," the First Circuit will affirm this enhancement so long as possession of the firearm has "'the potential to aid or facilitate'" the other felony. *Id*. at 111 (quoting United States v. Thompson, 32 F.3d 1, 6 (1st Cir. 1994)). The court affirmed, ruling that the readily accessible and proximate location of firearms in two apartments where the defendant had stored drugs supported the district court's conclusion that "it was [the defendant's] 'modus operandi to have guns near his stash of marijuana.'" 233 F.3d at 111 (citation omitted).

United States v. Sherwood, 156 F.3d 219 (1st Cir. 1998), *cert. denied*, 119 S. Ct. 888 (1999). The district court did not err in finding that the defendant's prior felony conviction was for a crime of violence, which resulted in a four-level increase in his base offense level under USSG 2K2.1(a)(3). The defendant was convicted of being a felon in possession of firearms and ammunition in violation of 18 U.S.C. § 922(g)(1). He began acquiring the firearms while on probation for two counts of conviction for second degree child molestation under Rhode Island law. The Rhode Island statute under which Sherwood was convicted, at the time he was charged, prohibited "sexual contact" with a person under 13 years of age. The court of appeals noted that, from the statute, the victim is at most 12 years old. The court agreed with the Fifth Circuit in United States v. Velazquez-Overa, 100 F.3d 418 (5th Cir. 1996), that child molestation crimes "typically occur in close quarters, and are generally perpetrated by an adult upon a victim who is not only smaller, weaker, and less experienced, but is also generally susceptible to acceding to the coercive power of adult authority figures." The court concluded that there is a significant likelihood that physical force may be used to perpetrate this crime and found that the Rhode Island statute at issue punishes a crime of violence.

United States v. Thompson, 32 F.3d 1 (1st Cir. 1994). The district court did not err in applying the cross-reference provision of USSG 2K2.1(c)(2) for the defendant's use of a firearm in

[3]The court also reversed the district court decision to sentence the defendant as a career criminal under §4B1.4. The court ruled that because the defendant's previous state conviction for breaking and entering did not involve criminal intent, it did not constitute a "violent felony" for which he could be sentenced as an armed career criminal under 18 U.S.C. § 924(e).

connection with the commission of another offense. The defendant and several other individuals were involved in a cocaine distribution enterprise. During a DEA investigation, a confidential informant sought to purchase a handgun while buying cocaine from the group. Although the gun was not available at the time the drugs were purchased, the defendant and another individual sold the gun to the CI upon his return the following day. The court of appeals held that the defendant's constructive possession of the handgun was "in connection with" the previous day's cocaine sale. The circuit court defined the phrase pursuant to its plain meaning, and determined that, for purposes of the cross-reference, the requisite causal link exists "where a defendant's possession of a firearm somehow aids or facilitates, or has the potential to aid or facilitate, the commission of another offense." *See* United States v. Brewster, 1 F.3d 51 (1st Cir. 1993). This broad interpretation of "in connection with" is consistent with the Supreme Court's construction of "in relation to" as that language appears in 18 U.S.C. § 924(c)(1). *See* United States v. Smith, 508 U.S. 223 (1993) ("in relation to" means that the gun at least must facilitate, or have the potential of facilitating the drug trafficking offense).

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.1 Smuggling, Transporting, or Harboring an Unlawful Alien

United States v. Li, 206 F.3d 78 (1st Cir.), *cert. denied*, 121 S. Ct. 379 (2000). The district court did not err when it departed upward under USSG 2L1.1, based on conditions on a drug trafficking ship constituting "dangerous or inhumane treatment, death or bodily injury, possession of a dangerous weapon or substantially more than 100 aliens." §2L1.1, comment. (n.5). A jury convicted defendants of conspiring to smuggle illegal aliens into the United States. Defendant Hui Lin objected to the increase on grounds that he did not mandate or encourage the poor conditions or the force used against the aliens. The court found that Hui Lin's authority over the stateside part of the conspiracy, his financial considerations, his use of an inadequate offloading vessel without regard that its use would require that the aliens forego sleep and fresh air, and his knowledge that enforcers were necessary to control passenger upheaval brought on by the mistreatment, demonstrated that he should have foreseen the poor conditions and abuse the aliens suffered. Defendant Ju Lin argued that there was insufficient evidence to warrant such a departure in his case. However, not only was Ju Lin in charge of the ship, and thus unlikely to be ignorant of the deplorable conditions or abuse, but Ju Lin assaulted two of the passengers. Defendants Li and Kwan argued that they did not deserve upward departures because they only served as translators and go-betweens, and thus could not have foreseen the unsanitary conditions. The court agreed with the district court findings that their responsibilities included more than they professed. Kwan, who proposed the illicit operation to the undercover agents, hired them to carry the aliens the final segment of the trip from China, participated in all of the negotiations with the agents, inspected the offloading vessel knowing it would have to carry 100 passengers, and informed an agent that minimal food was necessary on the offloading boat. Li also attended most of the negotiations and knew important information regarding the location of the vessel as well as finances; both defendants were aware of the need for enforcers and the lack of sleep and space that the passengers would suffer aboard the offloading vessel. The court also rejected Li and Kwan's argument that they received harsher upward departures than their codefendants. The court found, based on an adjustment calculation starting at the statutory mandatory minimum, which USSG 5G1.1(b) mandates when the statutory minimum exceeds the maximum guideline range, that the defendants actually received smaller departures than their codefendants. Li and Kwan had erroneously used the total offense level as a base for their calculations. All defendants appealed the six-level increase under USSG 2L1.1(b)(2)(C) for smuggling 100 aliens. The defendants argued that many passengers were co-conspirators, and thus could not qualify under USSG 2L1.1 as being smuggled for profit. Rejecting the argument, the court ruled that because the offense included 109 aliens, only four of whom could not be counted because they were codefendants, the enhancement properly applied; the motive behind the smuggling was irrelevant. Moreover, the requirement that the offense be committed for profit does not apply to USSG 2L1.1(b)(2)(C), but rather to a three-level increase under USSG 2L1.1(b)(1). Defendants Mu, Li, and Ben Lin argued that they should have received a three-level downward adjustment under USSG 2L1.1(b)(1) for not committing the offense for profit; their sole reward for participation in the conspiracy was free transportation. While not in complete agreement with the district court, the First Circuit deferred

to the district court and affirmed the finding that the defendants' valuable roles and responsibilities indicated that they would be paid beyond the benefit of free passage.

§2L1.2 Unlawfully Entering or Remaining in the United States

United States v. Cuevas, 75 F.3d 778 (1st Cir. 1996). The district court did not err in its application of a 16-level enhancement pursuant to USSG 2L1.2(b)(2) for unlawfully entering and remaining in the United States. The defendant argued that the enhancement he received was improper because neither of the two previous offenses he committed before being deported were a conviction for an "aggravated felony" and at least one of the offenses was not a "conviction" under state law. The circuit court rejected the defendant's arguments and joined the Fifth, Ninth, and Eleventh Circuits in holding that whether a particular deposition counts as a "conviction" in the context of a federal statute is to be determined in accordance with federal law. *See* Molina v. INS, 981 F.2d 14, 19 (1st Cir. 1992); Wilson v. INS, 43 F.3d 211, 215 (5th Cir. 1995); *cert. denied*, 516 U.S. 811 (1995); Ruis-Rubio v. INS, 380 F.2d 29 (9th Cir.), *cert. denied*, 389 U.S. 944 (1967); Chong v. INS, 890 F.2d 284 (11th Cir. 1989). The appellate court also relied upon the Supreme Court's interpretation in Dickerson v. New Banner Institute, Inc., 460 U.S. 103 (1983), in which the court held that whether one had been convicted within the language of a federal statute is necessarily . . . a question of federal, not state, law, despite the fact that the predicated offense and its punishment are defined by the law of the state. Additionally, the appellate court noted that even if the defendant's second prior possession offense was not a "conviction" his challenge to the application of USSG 2L1.2(b)(2) failed because his earlier conviction for cocaine possession was itself for an "aggravated felony."

United States v. Delgado-Reyes, 245 F.3d 20 (1st Cir. 2001). The district court erred when it ruled that Application Note 5 to USSG 2L1.2, which prohibits departures unless the aggravated felony meets certain narrow criteria, prevented it from departing downward under USSG 4A1.3. The defendant pled guilty to violating 8 U.S.C. § 1326 for illegal reentry after deportation for an aggravated felony. The court determined that because Note 5 addresses vertical departures under USSG 2L1.2, it does not limit horizontal departures under Chapter Four. "[B]y its terms, note 5 applies only to the offense level calculation," not to the criminal history determination. *Id*. at 22. The court remanded the case for resentencing so that the district court could depart from the criminal history category if it found that the assigned category overrepresented the severity of the defendant's prior convictions.

United States v. Johnstone, 251 F.3d 281 (1st Cir. 2001).[4] The district court did not err by finding that the defendant's previous state conviction for forgery constituted an aggravated felony under USSG 2L1.2. After the defendant pled guilty to reentering the country following deportation, in violation of 8 U.S.C. § 1326, the district court raised his sentence by 16 levels pursuant to §2L1.2(b)(1)(A). As referred to in the commentary for §2L1.2, 8 U.S.C. § 1101(a)(43) states that an aggravated felony includes "'an offense relating to . . . forgery . . . for which the term of imprisonment is at least one year . . . .'" *Id*. at 284-85 (quoting 8 U.S.C. § 1101(a)(43)(R)).

[4]The Court also affirmed the defendant's Apprendi appeal because the district court had sentenced him below the statutory maximum.

Because the defendant received a one-year prison sentence for his forgery conviction, the crime constitutes an aggravated felony under section 1101.

United States v. Luna-Diaz, 222 F.3d 1 (1st Cir. 2000). The district court abused its discretion when it failed to count the defendant's vacated conviction as an aggravated felony for enhancement purposes under USSG 2L1.2(b)(1)(A). The defendant was convicted of reentry after deportation in violation of 8 U.S.C. § 1326. Rejecting the government's argument that the appropriate measure for sentencing was not the defendant's current status, but rather his status at the time he was deported, the district court declined to raise the defendant's sentence by 16 levels, pursuant to USSG 2L1.2(b)(1)(A), because a state court had overturned the defendant's prior aggravated felony conviction for which he was deported. Consistent with Tenth Circuit precedent, the only circuit to hear this issue, the court vacated the sentence on grounds that the language in USSG 2L1.2 and section 1326 supports the government's argument that the appropriate time frame is deportation, not sentencing for the instant offense. United States v. Cisneros-Cabrera, 110 F.3d 746 (10th Cir. 1997) (affirming decision to enhance section 1326(b)(2) conviction based on vacated conviction because "the relevant time frame for determining whether the sentence enhancement should apply is specifically provided by statute."). Section 1326(b) addresses aliens "whose removal was subsequent to a conviction for commission of an aggravated felony." Section 2L1.2(b)(1)(A), which mandates an enhancement when the defendant "was deported after a criminal conviction . . . for an aggravated felony," specifically addresses aliens either currently convicted of an aggravated felony or who have had prior such convictions. Moreover, this language, written in past tense, implies that the defendant's current status is irrelevant. Finally, unlike USSG 2L1.2, other guidelines and statutes that deal with previous convictions expressly prohibit inclusion of vacated convictions for sentencing purposes. *See, e.g.*, USSG 4A1.2, comment. (n.6) (exempting certain vacated convictions from the calculation of criminal history category); Armed Career Criminal Act, 18 U.S.C. § 924 (1994) (prohibiting the consideration of expunged or set aside convictions). The absence of an express exception to USSG 2L1.2(b) for vacated convictions precludes the court from reading such exception into the guideline. The court vacated the sentence and remanded for resentencing.

United States v. Restrepo-Aguilar, 74 F.3d 361 (1st Cir. 1996). The district court did not err in adding 16 offense levels to the defendant's sentence based on a finding that the defendant had been previously "deported after a conviction for an aggravated felony." *See* §2L1.2. The defendant had been previously deported after a state court conviction for possessing cocaine. At sentencing, the defendant unsuccessfully argued that the term "aggravated felony" should not include his state court felony that would have been punished only as a misdemeanor under federal law. On appeal, the court noted that the commentary to §2L1.2 defines "aggravated felony" as "any illicit trafficking in any controlled substance." This definition, the court held, does not limit the application of the 16-level enhancement to offenses that would be classified as felonies if prosecuted under federal law. Rather, a previous conviction for "any illicit trafficking in any controlled substance" would require the 16-level increase. This position, the court noted, is further supported by the commentary to §2L1.2, which indicates that the "aggravated felony" enhancement applies to offenses "whether in violation of federal or state law."

United States v. Rodriguez, 26 F.3d 4 (1st Cir. 1994). The defendant was deported to Columbia after he was convicted for two aggravated felonies. He illegally reentered the

United States on September 5, 1991. He was "found" in the United States on December 19, 1991. Between September 5 and December 19, USSG 2L1.2(b)(2) was amended to require, rather than suggest, an increase in the base offense level for an alien whose deportation followed conviction for an aggravated felony. The district court was correct in sentencing the defendant under the amended version of the guideline because the act of illegally entering the United States can occur on three separate occasions: (1) when she/he enters the United States, (2) when she/he attempts to illegally enter the United States, (3) when she/he is "found" in the United States. Regardless of when the defendant entered the United States, he violated the statute when he was "found" in the United States and was properly sentenced in accordance with the guidelines in effect on that date.

Part S Money Laundering and Monetary Transaction Reporting

§2S1.3 Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports

United States v. Beras, 183 F.3d 22 (1st Cir. 1999). The district court did not err in assessing seven-point enhancement for "loss" exceeding $120,000 under USSG 2F1.1(b)(1)(h). The defendant was convicted of failing to report that he was transporting over $10,000 out of the United States. Defendant's argument that the offense involved no "loss" is without merit because USSG 2S1.3, the applicable guideline, provides a base offense level of "6 plus the number of offense levels from the table in USSG 2F1.1 . . . corresponding to the value of the funds." The $138,794 was the "value of the funds" the customs officers found on the defendant and codefendant.

Part X Other Offenses

§2X1.1 Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Characteristic)

United States v. Rodriguez, 215 F.3d 110 (1st Cir. 2000), *cert. denied*, 121 S.Ct.1658 (2001). The district court did not err when it enhanced the defendant's sentence by two levels under USSG 2D1.1(b)(2)(B) for acting as a captain aboard a vessel carrying a controlled substance. The defendant was convicted of conspiracy to import more than 5,000 pounds of marijuana, in violation of 21 U.S.C. § 952(a) and 21 U.S.C. § 963, as well as attempting to import more than 5,000 pounds of marijuana, in violation of 21 U.S.C. § 952(a), 21 U.S.C. § 963, and 18 U.S.C. § 2. The court found irrelevant the defendant's argument that the enhancement only applies to people actually convicted of importation of drugs. Section 2X1.1 mandates that the offense level for conspiracy and attempt include "'*any adjustments from* [*the substantive offense*] *guideline* for any intended offense conduct that can be established with reasonable certainty.'" *Id*. at 124 (quoting §2X1.1(a)). Section 2D1.1 is not excepted from these adjustments and thus must be applied in cases of conspiracy and attempt to commit drug offenses. The sentence was affirmed.

United States v. Egemonye, 62 F.3d 425 (1st Cir. 1995). The district court did not err in not applying USSG 2X1.1 to determine the amount of loss caused by the defendant's offense. The

defendant was convicted of offenses relating to the possession and use of other people's credit cards. The district court computed the loss by including the aggregate credit limit of all the credit cards purchased from the undercover officer, even though many of the cards had not been used. The defendant unsuccessfully argued that only a some of the credit cards should be included in the loss calculation because he had not recovered the amounts from the unused cards. The defendant argued that the court should use USSG 2X1.1 which gives a defendant a three-level discount if he is "some distance from completing the substantive crime." The circuit court rejected this argument and held that USSG 2X1.1 only applies to cases where the substantive offense has not been completed. The court added that USSG 2X1.1 is not relevant to the present case because 14 of the 15 counts against the defendants involved completed substantive offenses. The circuit court noted that under USSG 2F1.1, intended loss should be used if the amount is greater than actual loss. The court concluded that the district court was not in plain error for including "the aggregate limit of $200,000" of all the cards in the amount of loss calculation.

§2X3.1 Accessory After the Fact

United States v. Vega-Coreano, 229 F.3d 288 (1st Cir. 2000). The district court did not commit clear error when it declined to cap the defendant's offense level at 20 for conduct limited to harboring a fugitive, pursuant to USSG 2X3.1. The defendant pled guilty to violating 18 U.S.C. § 3 for being an accessory to a robbery after the fact. Finding that the record reflected actions exceeding merely harboring a fugitive, the court affirmed. Besides renting hotel rooms for the robbery participants to hide, the defendant assisted in the concealment of the stolen money and relayed important information between parties.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.2 Official Victim

United States v. Lee, 199 F.3d 16 (1st Cir. 1999). The district court did not err when it enhanced the defendant's sentence by three levels under the official victim guideline, §3A1.2(b), for "assault[ing an] officer in a manner creating a substantial risk of serious bodily injury" "during the course of the offense or immediate flight therefrom." After a traffic stop, the defendant struggled with several officers before they subdued him and found a loaded weapon in his waistband. The defendant pled guilty to being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). Because the district court made no finding as to the defendant's state of mind at the time, the court was uncertain as to whether the defendant's actions satisfied the assault requirement of the enhancement. After establishing that the term "assault" in USSG 3A1.2(b) referred to the common law assault definition, and not the federal statute regarding assault of a federal officer (18 U.S.C. § 111) or the aggravated assault sentencing guideline (§2A2.2), the court found that the guideline policy of protecting official victims supports a finding that a defendant need only have knowledge of the consequences of his actions to commit assault under USSG 3A1.2(b). Thus, as with an escaping felon who drives directly at an officer,

knowing the officer's location but not necessarily wanting to hit him, "so long as the criminal has ample reason to know that fear will be caused, the lack of purpose to cause fear should not matter." *Id*. at 19*; see also, e.g.*, United States v. Garcia, 34 F.3d 6, 11, 13 (1st Cir. 1994) (imposing a USSG 3A1.2(b) enhancement where an officer had to jump out of the way to avoid being hit by the defendant driving straight at police officers); United States v. Stanley, 24 F.3d 1314, 1322 (11th Cir. 1994) (adjusting defendant's sentence under USSG 3A1.2(b) for driving such that it endangered the lives of the officers trying to arrest him). Because the officers shouted that the defendant was grabbing for his waist as they attempted to grab his hands to stop him, the defendant must have known that his efforts to draw his gun would almost certainly alarm the officers. On this ground, the court affirmed the sentence. The court added that there is a fine line, often just "a matter of degree," between a three-level official victim enhancement under USSG 3A1.2(b) and a two-level reckless endangerment adjustment under USSG 3C1.2, and that it would likely defer to the district court's better "feel for the factual subtleties involved" in determining which adjustment was appropriate. 199 F.3d at 20. Furthermore, had the official victim adjustment not applied here, the defendant's conduct would have warranted a reckless endangerment enhancement.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Cali, 87 F.3d 571 (1st Cir. 1996). The district court's holding enhancing the defendant's sentence based on his role as a manager was in error because the defendant managed property, but not people. §3B1.1. However, the district court's alternative holding that a three-level upward departure was warranted because of the defendant's management of gambling assets was a proper assessment of an encouraged departure factor. §3B1.1, comment. (n.2). The sentence was affirmed.

United States v. Gonzalez-Vazquez, 219 F.3d 37 (1st Cir. 2000). The district court did not err when it enhanced the defendant's sentence under USSG 3B1.1(b) for his role as a manager or supervisor. A jury convicted the defendant of conspiracy to distribute controlled substances and aiding and abetting the distribution of controlled substances within 1,000 feet of a school. The court ruled that the record sufficiently supported the role enhancement. The defendant "was second in command at the drug [distribution] point . . . [and] played a leadership role in arranging with [the confidential informant] to use her apartment for drug packaging." *Id*. at 44.

United States v. Li, 206 F.3d 78 (1st Cir.), *cert. denied*, 121 S. Ct. 379 (2000). The district court did not err when it enhanced the defendant's sentence by four levels under USSG 3B1.1(a) for his role as a leader or organizer. A jury convicted the defendant of conspiring to smuggle illegal aliens into the United States. Affirming the enhancement, the court ruled that evidence that the defendant inspected the vessel to be used to bring the aliens to the United States, conducted negotiations with the undercover agents serving as owners of the vessel, and handled the finances regarding its use, sufficiently indicated that the defendant controlled the stateside branch of the conspiracy, thus warranting the enhancement. Moreover, even if the district court

had erred, such error would have been harmless because under either circumstance the court would have raised the defendant's guideline range to the statutory minimum for the offense.

United States v. Patrick, 248 F.3d 11 (1st Cir. 2001).[5] The district court did not err by enhancing defendants' sentences under USSG 3B1.1 for their supervisory roles. Defendants were sentenced to life imprisonment after being convicted of racketeering under 18 U.S.C. § 1962(c), conspiracy to commit racketeering under 18 U.S.C. § 1962(d), conspiracy to distribute crack cocaine under 21 U.S.C. § 846, and possession with intent to distribute crack under 21 U.S.C. § 841(a)(1). Arthur was also convicted of murder in aid of racketeering, pursuant to 18 U.S.C. § 1959. Affirming Patrick's enhancement for being an organizer or leader under USSG 3B1.1(a), the court found that the record supported the district court's decision. The record revealed that Patrick was the "ultimate decisionmaking authority in the [gang]," determining who could sell drugs and when to fight rival dealers, as well as recruiting accomplices and supplying large amounts of drugs. *Id*. at 27. The court also affirmed Arthur's supervisory role under USSG 3B1.1(b) based on evidence that he "owned and distributed large quantities of crack . . . gave orders to younger [gang] members, and used violence to eliminate rivals." *Id*.

United States v. Stein, 233 F.3d 6 (1st Cir. 2000), *cert. denied*, 121 S. Ct.1406 (2001). The district court did not clearly err when it enhanced defendant's sentence by two levels for being an organizer, leader, manager, or supervisor under USSG 3B1.1(c). The defendant was convicted of bankruptcy fraud and conspiracy to commit bankruptcy fraud, in violation of 18 U.S.C. §§ 152 and 371. Affirming the role enhancement, the court found that the district court could have reasonably concluded that the defendant and his wife planned and executed a scheme to defraud creditors through the use of a third party trust. The couple conveyed the property to a third party, then failed to disclose it throughout bankruptcy proceedings. During the concealment period, the defendant and his wife continued to make decisions regarding the property, including paying bills, receiving tax and insurance information, controlling the sale of the property, and spending the proceeds from its sale. The court added that there is no authority addressing whether USSG 3B1.1 applies when two individuals act together to supervise another party, but did not consider the issue because the defendant did not raise it.

§3B1.2 Mitigating Role

United States v. DeMasi, 40 F.3d 1306 (1st Cir. 1994), *cert. denied*, 513 U.S. 1132 (1995). The district court did not err in determining that the defendant's participation in an attempted robbery fell between a minor and a minimal role, thus warranting a three-level reduction in base offense level. The government had challenged the reduction, arguing that the district court impermissibly based this determination on the fact that the defendant's role as a lookout was less reprehensible than the roles of his co-defendants, and not because he was less culpable. The

[5]The Apprendi arguments were rejected because the record established that no jury would have failed to convict defendants of the crimes for which they were convicted under the higher reasonable doubt standard. Furthermore, "the jury found beyond a reasonable doubt that Arthur committed murder, which carries a mandatory sentence of life imprisonment." 248 F.3d at 28.

circuit court rejected this argument, concluding that the record established the defendant was both less culpable than most of his co-defendants and less culpable than the "average person" who commits the same offense. *See* §3B1.2, comment. (n.1-3).

United States v. Portela, 167 F.3d 687 (1st Cir.), *cert. denied*, 1999 WL 700460 (Oct. 4, 1999) (No. 99-5795). The district court did not err in failing to notify the defendant in advance of the sentencing hearing that the court intended to reject the presentence report's recommendation that the defendant receive a two-level adjustment under §3B1.2 for being a "minor participant." The government waited until the sentencing hearing to object to the PSR recommendation, but the court stated it would not have granted the adjustment even if the government had not objected. A defendant is not entitled to notice of a court's intention to diverge from adjustments recommended in the presentence report. "So long as the court's determination involved adjustments under the provisions of the guidelines and not departures from the guidelines, 'the guidelines themselves provide notice to the defendant of the issues about which he may be called upon to comment.'" *citing* United States v. Canada, 960 F2d 263, 266-267 (1st Cir. 1992).

§3B1.2 Mitigating Role

United States v. Coviello, 225 F.3d 54 (1st Cir. 2000), *cert. denied*, 121 S. Ct. 839 (2001). The district court properly refused to reduce the defendant's sentence under USSG 3B1.2 for minimal or minor participation. The defendant argued that he should have received a reduction because he participated in only one transaction during the two-year conspiracy to transport stolen property through interstate commerce and to launder money. Affirming the decision, the court held that reductions are warranted only if the defendant plays less of a role than the average participant "*in the conduct that formed the basis of* [*the*] *sentence*"; minimal or minor involvement in the entire conspiracy does not suffice. *Id*. at 67 (*emphasis added*); *see also, e.g.,* United States v. James, 157 F.3d 1218, 1220 (10th Cir. 1998) (role reduction not appropriate where sentence was based on the quantity of drugs attributable to defendant and not that distributed by the whole conspiracy); United States v. Atanda, 60 F.3d 196, 198 (5th Cir. 1995) ("When a sentence is based on an activity in which a defendant was actually involved, USSG 3B1.2 does not require a reduction in the base offense level even though the defendant's activity in a larger conspiracy may have been minor or minimal."). The defendant's participation enhancement, smaller than that imposed on codefendants involved in the whole conspiracy, was based on the sole transaction in which he participated. The court found that the defendant's significant role in that transaction, the most lucrative single sale of the conspiracy, did not warrant a reduction. The defendant arranged the sale with the buyer, controlled the stolen goods until he delivered them to the buyer, and was supposed to keep a significant portion of the profit from the sale. *See also, e.g.,* United States v. Vega-Coreano, 229 F.3d 288, 291 (1st Cir. 2000) (reduction not warranted for being a minor participant in a robbery when defendant was only charged with acting as an accessory after the fact).

United States v. Ortiz-Santiago, 211 F.3d 146 (1st Cir. 2000). The district court did not err when it refused to reduce the defendant's sentence under USSG 3B1.2 for minimal or minor participation. The defendant pled guilty to conspiracy and drug charges stemming from two smuggling incidents. The court rejected the defendant's argument that his participation consisted

of "infrequent, relatively low-level tasks." *Id*. at 148. The record revealed that the defendant "had unloaded a sizable drug shipment and had conducted surveillance" to support the conspiracy, which is sufficient to preclude a sentence reduction. *Id*. at 149. Moreover, the district court's calculation of his offense level had already addressed the defendant's concern. Despite the seizure of about 1,000 kilograms of cocaine and substantial quantities of heroin, marijuana, and other contraband during the course of the smuggles in which defendant participated, the district court only attributed to the defendant 50 to 150 kilograms of cocaine. Ruling that a sentencing court can decide not to grant a particular reduction if it finds that another adjustment has adequately addressed the specific offense characteristic, the court affirmed the denial of the role-in-the-offense reduction.

United States v. Rosario-Peralta, 199 F.3d 552 (1st Cir. 1999), *cert. denied*, 121 S. Ct. 241 (2000). The district court did not demonstrate clear error when it declined to reduce defendants' sentences under USSG 3B1.2 for minimal or minor participation. A jury convicted the defendants of possession with intent to distribute cocaine while on the high seas, in violation of 46 U.S.C. App. § 1903(a), (b)(1), and (f). The defendants appealed on the grounds that they were unaware of the scope and organization of the offense, had no sophisticated or supervisory responsibilities, and made no material decisions. Rejecting these arguments and affirming the sentences, the court ruled that the defendants' arguments are of little relevance to this §3B1.2 analysis because they were not convicted of conspiracy. Furthermore, the record showed that the defendants were the only individuals on the ship containing the cocaine and that no defendant was less culpable than his codefendants.

§3B1.3 Abuse of Position of Trust or Use of Special Skill

United States v. Noah, 130 F.3d 490 (1st Cir. 1997). The district court did not err in finding that the combination of abilities necessary to prepare and file tax returns electronically qualified as a special skill subject to enhancement under the guidelines. The defendant argued that electronic filing was a task anyone can master. The court of appeals noted that even if an average person can accomplish a specialized task with training, it does not convert the activity into an ordinary or unspecialized activity. "The key is whether the defendant's skill set elevates him to a level of knowledge and proficiency that eclipses that possessed by the general public."

United States v. O'Connell, 252 F.3d 524 (1st Cir. 2001). The district court did not err by enhancing the defendant's sentence for abuse of trust under §3B1.3 after he pled guilty to making, possessing, and uttering counterfeit and forged securities, in violation of 18 U.S.C. § 513(a). The district court disagreed with the defendant's argument that he did not hold a position of trust because he could not sign checks and because an accountant oversaw his actions. Affirming the enhancement, the court ruled that the defendant's authority to access the line of credit to the business's checking account "suggested significant managerial discretion" and his close relationship with the owners of the business "rendered him uniquely trusted as an employee," establishing for sentencing purposes that he occupied a position of trust. *Id*. at 529.

United States v. Reccko, 151 F.3d 29 (1st Cir. 1998). The district court erred in finding that the defendant's position as a switchboard operator at police headquarters was a "position of

trust." When the defendant noticed a large group of DEA agents gathering at the station, she alerted her drug dealer friend, who canceled a sizable marijuana delivery that would have taken place that evening. The cancellation thwarted the law enforcement agents. The court of appeals stated that the district court should first have decided where there was a position of trust, and not simply gone to the second step of the analysis, whether the defendant used her position to facilitate a crime. Critical to the first step in the analysis is the question of whether the position embodies managerial or supervisory discretion, the signature characteristic of a position of trust, according to the application notes. The defendant had no such discretion and so could not receive the enhancement.

United States v. Sotomayor-Vazquez, 249 F.3d 1 (1st Cir. 2001). The district court did not err by enhancing the defendant's sentence by two levels for abuse of a position of trust under USSG 3B1.3. The defendant was convicted of conspiracy, two counts of embezzlement, and 24 counts of money laundering, in violation of 18 U.S.C. § 1956(a). The court rejected the defendant's arguments that he could not be characterized as one in a position of trust because he did not have the power to make decisions and other persons in the business had the authority disregard his advice. Citing precedent establishing that to warrant an enhancement, "a defendant need not legally occupy a formal 'position of trust,' nor have 'legal control,'" the court found that the defendant enjoyed the "type of discretion contemplated by the enhancement." *Id*. at 19 (quoting United States v. Newman, 49 F.3d 1, 8-9 (1st Cir. 1995)). The defendant controlled the company's finances, as well as played a significant role in the decisions made by other businesses with whom the company had direct relationships.

§3B1.4 Using a Minor to Commit a Crime

United States v. Patrick, 248 F.3d 11 (1st Cir. 2001). The district court did not err by enhancing the defendant's sentence under USSG 3B1.4 for using juveniles to commit a crime. The defendant was sentenced to life imprisonment after being convicted of racketeering under 18 U.S.C. § 1962(c), conspiracy to commit racketeering under 18 U.S.C. § 1962(d), conspiracy to distribute crack cocaine under 21 U.S.C. § 846, possession with intent to distribute crack under 21 U.S.C. § 841(a)(1), and murder in aid of racketeering, pursuant to 18 U.S.C. § 1959. The court affirmed the defendant's §3B1.4 enhancement despite the absence of evidence that he had employed minors. The court determined that under §1B1.3(a), which requires that this enhancement be derived from "'all reasonably foreseeable acts ... of others in furtherance of the jointly undertaken criminal activity,'" a conspirator's sentence can be enhanced based on the "reasonably foreseeable" use of minors by co-conspirators in furtherance of the crime. §1B1.3(a).

Part C Obstruction

§3C1.1 Obstructing or Impeding the Administration of Justice

United States v. Walker, 234 F.3d 780 (1st Cir. 2000). The district court did not abuse its discretion when it declined to enhance defendant's sentence for obstruction of justice under USSG 3C1.1. The government argued that its rebuttal witness's testimony, inconsistent with that of the defendant, demonstrated that the defendant had committed perjury at the sentencing hearing.

However, the government witness had previously made a statement to defense counsel inconsistent with his rebuttal testimony and in support of defendant's testimony, of which the government was aware. Rejecting the government's argument that it was in no position to give notice because it could not know ahead of time how the defendant would testify or that it would seek a USSG 3C1.1 enhancement, the district court ruled that, as a factual matter, the government should have given the defense notice of the change in its witness's testimony, making it clear that false testimony from the defendant would lay the foundation for an enhancement. Recognizing the substantial deference to be paid to the district court regarding this discretionary matter, the court affirmed the district court decision. "Unfair surprise in witness testimony is one instance where the judicious management of the trial process by the trial judge plays a critical role." *Id*. at 787. Not only did the government agree that it had an obligation to give notice to the defense if, before sentencing, it was aware of the basis for its obstruction enhancement claim, but the government knew that the defense was relying on erroneous information when it introduced the defendant's testimony.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

United States v. Zanghi, 1999 WL 669182 (1st Cir. 1999). The district court did not err in grouping the defendant's counts under 18 U.S.C. §1956 (money laundering) with the counts under 18 U.S.C. § 1957(a) (monetary transactions with proceeds of securities fraud) and applying USSG 2S1.1, the money laundering guideline. The defendant argued that the court erred in determining the offense level under USSG 2S1.1 using amounts from the monetary transactions offenses because the money laundering guideline is much more punitive than USSG 2S1.2, the guideline applicable to the 1957 offense. Offense guidelines listed in the same row in §3D1.2(d), like USSG 2S1.2 and 2S1.1, are to be grouped automatically. The court correctly applied USSG 2S1.1, the "offense guideline that produces the highest offense level," and used the aggregate total value of the funds to determine the offense level. *See* §3D1.3(b)

§3D1.4 Determining the Combined Offense Level

United States v. Hernandez-Coplin, 24 F.3d 312 (1st Cir.), *cert. denied*, 513 U.S. 956 (1994). The circuit court affirmed the district court's decision to depart up from less than two years to nine years imprisonment. The defendant, convicted of two separate incidents of smuggling illegal aliens, subjected them to dangerous shipboard conditions and forced passengers overboard into heavy tides, which resulted in two drowning deaths. The circuit court vacated and remanded the sentence, however, based on the district court's misapplication of the grouping rules for multiple counts. The district court failed to combine the groups of closely related counts under USSG 3D1.4. This resulted in an incorrect starting point for the departure, and remand was required for resentencing from the correct combined base offense level of 13.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Cunningham, 201 F.3d 20 (1st Cir. 2000). The defendant pled guilty to racketeering conspiracy, racketeering, making an extortionate extension of credit, collecting an extortionate extension of credit with extortionate means, conspiring to use extortionate means to collect a debt, and operating an illegal gambling business. The parties had negotiated a plea agreement throughout December 1997 and January 1998. In March 1998, the defendant informed the government that he intended to plead guilty, which he did in April, but that he would contest the forfeiture allegations. At sentencing, the district court awarded a two-level reduction for acceptance of responsibility under USSG 3E1.1, but declined to award another level decrease, for timely notification of his intent to plead guilty, based on the defendant's late decision to plead guilty six weeks before trial and because the government still had to prepare for the forfeiture trial. On appeal, the defendant argued that the district court should not have considered the forfeiture trial in its USSG 3E1.1(b) determination because forfeiture is part of sentencing; the defendant further argued that there was no evidence that the government had prepared for trial or that his late notification affected the allocation of court resources. The court agreed with the defendant

regarding forfeiture, citing Supreme Court precedent ruling that forfeiture "'is an element of the sentence,'" operating as a penalty for violating racketeering laws, not as a separate offense. *Id*. at 24 (quoting Libretti v. United States, 516 U.S. 29, 38-39 (1995). However, the court noted that it could still uphold the district court decision if removal of that ground would not alter the district court's reasoning. Finding that the record was too ambiguous to determine whether the district court erred in not departing further, despite the erroneous consideration of forfeiture, the court remanded for clarification. It suggested that on remand the district court determine the extent to which, if at all, the government prepared for trial before the defendant informed it of his decision to plead guilty, and whether the delay in the defendant's notification of such intention caused an inefficient allocation of court resources.

United States v. Franky-Ortiz, 230 F.3d 405 (1st Cir. 2000). The district court did not abuse its discretion when it refused to lower the defendant's offense level for acceptance of responsibility under USSG 3E1.1. A jury convicted the defendant of conspiring to distribute controlled substances and using and carrying firearms during and in relation to the commission of a drug-trafficking offense. Relying on commentary to USSG 3E1.1 discouraging its application in situations where the defendant proceeds to trial, "denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse," the court affirmed the district court decision. §3E1.1, comment. (n.2). The record revealed that throughout the five-week trial, the defendant vehemently refuted the essential facts upon which he was convicted and admitted guilt and remorse only after being convicted and confronted with a life sentence. The district court did not err by determining that this case did not represent the rare occasion of post-conviction admission of guilt that warrants an acceptance of responsibility adjustment. Moreover, the defendant's argument that he proceeded to trial because he was dissatisfied with the plea offer does not support his acceptance of responsibility claim. Because no defendant can require leniency in return for a guilty plea and the government cannot prevent a defendant from admitting guilt, dissatisfaction with a plea offer does not offset a decision to proceed to trial, denying all guilt, for purposes of USSG 3E1.1.[6]

United States v. Portela, 167 F.3d 687 (1st Cir.), *cert. denied*, 1999 WL 700460 (Oct. 4, 1999) (No. 99-5795). The district court did not err in finding that the defendant who went to trial was not entitled to a reduction for acceptance of responsibility. The defendant argued that he was attempting to raise a legal issue by pursuing a claim that there were multiple conspiracies rather than a single conspiracy. The defendant had also pled not guilty to substantive, non-conspiracy counts and at sentencing continued to be a member of the larger conspiracy. The defendant had no support for his position that the multiple conspiracy argument was not simply an "issue related to factual guilt," and the defendant did not express contrition before trial.

United States v. Rosario-Peralta, 199 F.3d 552 (1st Cir. 1999), *cert. denied*, 121 S. Ct. 241 (2000). The district court's decision not to reduce the defendants' sentences by two levels under USSG 3E1.1(a) for acceptance of responsibility was not clearly erroneous. A jury

[6]The defendant also argued that he proceeded to trial to protect an objection to a pretrial motion. The court refused to consider the argument because not only was it not raised before the sentencing judge, but it was not discussed in defendant's appellate brief.

convicted the defendants of possession with intent to distribute cocaine while on the high seas. The defendants objected to the enhancement on grounds that "they cannot be punished for preserving their constitutional right to appeal by maintaining their innocence." *Id*. at 570. Joining other circuits, the court affirmed the sentences based on the defendants' decisions to proceed to trial and their maintenance of their factual innocence on appeal. *See, e.g.*, United States v. Davis, 960 F.2d 820, 829 (9th Cir. 1992); United States v. McDonald, 935 F.2d 1212, 1222 (11th Cir. 1991); United States v. Monsour, 893 F.2d 126, 129 (6th Cir. 1990). A §3E1.1 reduction is a "special leniency" granted to remorseful defendants who accept responsibility early in the proceedings, the absence of which is not a punishment for defendants who assert their rights. The reality that defendants must make a "difficult choice" about whether to accept responsibility does not violate their right to trial or to appeal. 199 F.3d at 570-71. The court also rejected Javier's argument that he had expressed remorse. Not only did Javier fail to express regret or even mention the crime when he stated that he felt "'very bad about the position [he was] in,'" but he "appeared to express displeasure with the consequences of being convicted of the crime." *Id*. at 571.

United States v. Saxena, 229 F.3d 1 (1st Cir. 2000).[7] The district court did not err when it declined to adjust the defendant's sentence under USSG 3E1.1 for acceptance of responsibility. The defendant pled guilty to selling unregistered securities, engaging in prohibited transactions, mail fraud, and making false and fraudulent claims, after publishing a newsletter offering investment advice based on a computer program designed to reveal the most lucrative times to buy and sell certain securities. The district court refused to apply USSG 3E1.1 because, while out on bail awaiting sentencing, the defendant solicited subscriptions to an Internet newsletter whose advice, based on the same computer program, guaranteed to lead readers to huge profits. Affirming the decision, the court found that the district court could have reasonably interpreted the defendant's post-conviction conduct to be inconsistent with the genuine and candid contrition required under the guideline. The defendant's actions showed either an insensitivity or a lack of comprehension of the error of his crime. The district court could have also reasonably concluded from his actions that the defendant planned only to recognize that his first venture violated the technical securities laws, not that he had acted inappropriately.

United States v. Vega-Coreano, 229 F.3d 288 (1st Cir. 2000). The district court did not clearly err when it refused to reduce the defendant's sentence under USSG 3E1.1 for acceptance of responsibility. The defendant pled guilty to violating 18 U.S.C. § 3 for being an accessory to a robbery after the fact. Based on her inconsistent testimony regarding when she first learned who participated in the robbery, the court affirmed the district court finding that the defendant had "wavered in her willingness to take complete responsibility for her criminal acts." *Id*. at 290. The court affirmed the sentence.

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[7]The defendant also appealed the fine assessed under 18 U.S.C. § 3472(a), arguing that the district court did not consider all the factors required under section 3472(a). The court found that the sentencing court adequately followed the statute. The district court adopted the PSR, which included sufficient information regarding the defendant's finances and the potential affect on his family. Additionally, the defendant provided substantial information about his ability to pay a fine. Finally, the district court imposed a fine at the low end of the sentencing range, showing that he considered the necessary factors.

United States v. Walker, 234 F.3d 780 (1st Cir. 2000). The district court's refusal to reduce the defendant's sentence under USSG 3E1.1 for acceptance of responsibility was not clearly erroneous. The defendant pled guilty to embezzlement under 18 U.S.C. § 664. The court affirmed based on the district court's finding that despite his guilty plea, the defendant had participated in conduct inconsistent with acceptance of responsibility.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Roberts, 39 F.3d 10 (1st Cir. 1994). The district court sentenced the defendant under Criminal History Category II, based upon a 1986 state court diversionary disposition on a charge of driving under the influence of alcohol and operating a motor vehicle to endanger. Those charges were continued by the state court without a finding, upon the defendant's admission of sufficient facts to sustain a finding of guilt. The government urged that under USSG 4A1.1(c), the diversionary disposition was properly counted. The defendant urged the appellate court to follow the Seventh Circuit's opinion in United States v. Kozinski, 16 F.3d 795 (7th Cir. 1994), that such a diversionary procedure amounts to diversion from the judicial process without a finding of guilt, for which no criminal history points may be awarded. The appellate court determined that the government had not carried its initial burden of proof to show that "what happened in 1986 was in substance an admission of guilt," and remanded the case to the district court. The appellate court noted that the district court could also determine that it would give the same sentence within the range regardless of whether it applied category I or II. Finally, the appellate court suggested that the Sentencing Commission might wish to examine this subject and the guideline.

United States v. Torres-Rosa, 209 F.3d 4 (1st Cir. 2000). The district court did not err when it included two prior Puerto Rico felony convictions in the criminal history calculus under USSG 4A1.1. The defendant pled guilty to conspiracy to possess within intent to distribute cocaine. The defendant argued that his Puerto Rico convictions should not count because the Sentencing Guidelines make no specific mention of Puerto Rico when they describe the jurisdictions from which relevant convictions can originate for purposes of calculating criminal histories. *See* §4A1.1, comment. (backg'd). The court had previously rejected the same argument, ruling that because Congress has granted to Puerto Rico "'the degree of autonomy and independence normally associated with States of the Union,'" there could be no clear error unless the defendant showed "'that the Sentencing Commission meant to exclude felony convictions in Puerto Rico Commonwealth Courts for enhancement purposes.'" 209 F.3d at 8 (quoting United

States v. Morales-Diaz, 925 F.2d 535, 540 (1st Cir. 1991). The defendant failed to satisfy this burden; the court affirmed the criminal history calculation.[8]

§4A1.2 Definitions and Instructions for Computing Criminal History

United States v. DiPina, 230 F.3d 477 (1st Cir. 2000). The district court appropriately included the defendant's juvenile disposition when it determined his criminal history category under USSG 4A1.2, thus preventing the application of the safety valve provision. The court rejected the defendant's argument that his juvenile disposition for unlawful delivery of heroin was a diversionary disposition and thus, under USSG 4A1.2(f), could not be counted as a prior sentence.[9] Because the guidelines do not define a diversionary disposition, the court reviewed examples of such dispositions from this and other circuits. Consistent with previous decisions, the First Circuit held that cases where courts do not defer adjudication or sentencing, but rather enter a finding and impose a sentence immediately after hearing arguments, do not constitute diversionary dispositions. *Cf.* United States v. Morillo, 178 F.3d 18, 21 (1st Cir. 1999) (holding that a "continuance without a finding," based on an admission of facts sufficient for a guilty finding, was a diversionary disposition); United States v. Cadavid, 192 F.3d 230, 235 (1st Cir. 1999) (affirming the finding of a diversionary disposition where a judge withheld adjudication of a battery conviction); *see also* United States v. Shazier, 179 F.3d 1317, 1319 (stating that "[§4A1.2(f)] does not apply to sentences where confinement is imposed and served"); United States v. Crawford, 83 F.3d 964, 966 (8th Cir. 1996) (rejecting an argument that a completed sentence constituted a diversionary disposition). The juvenile court did not defer adjudication or sentencing of the defendant's heroin sales charge. It entered a finding of delinquency and immediately sentenced the defendant to 18 months' incarceration at a facility for serious juvenile offenders. Finally, the court rejected the defendant's arguments that his admission of sufficient facts did not constitute a guilty plea for purposes of USSG 4A1.2(a)(1). The court had concluded earlier that in order for an admission of sufficient facts to constitute a guilty plea, the court must find that "the defendant confessed to certain events or that other evidence proves such events, and that the events constituted a crime." United States v. DiPina, 178 F.3d 68, 75 (1st Cir. 1999). The court found that the record reflected that the defendant's admission of sufficient facts satisfied that standard.

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[8]The defendant also argued that he should have been able to withdraw his plea because he did not know when he pled guilty that the Puerto Rico convictions would be calculated into his sentence. The court rejected the argument for several reasons. The court found such ignorance to be implausible, the defendant waited more than one month after the PSI Report was filed before he moved to withdraw his plea, and the defendant failed to profess his innocence or identify any error in the plea proceedings. Moreover, the defendant did receive the benefit of the plea bargain, despite the increase in the government's recommended sentence. Pursuant to the plea agreement, the district court reduced his sentence for acceptance of responsibility, attributed a lower quantity of drugs to him, and dismissed other charges; the agreement did not stipulate a criminal history level.

[9]The defendant made the same arguments for two other juvenile dispositions, but the court did not address them because including the heroin disposition alone precluded the application of the safety valve provision.

United States v. Ticchiarelli, 171 F.3d 24 (1st Cir.), *cert. denied*, 1999 WL 412932 (U.S. Oct. 4, 1999). In resentencing the defendant after the case had been remanded, the district court erred in including as a "prior sentence" under USSG 4A1.2(a)(1) a sentence imposed after the original sentencing. After the defendant's original sentencing on the instant offense, he was convicted and sentenced for a Florida offense. He then appealed his original district court sentence based on the district court's drug calculation for an offense involving hashish oil and marijuana, and the case was remanded with instructions that the district court treat hashish oil as marijuana. When an original sentence is vacated and remanded only for resentencing, "prior sentence" means a sentence prior to the original sentence. Law of the case doctrine and the mandate rule do not permit de novo resentencing on all sentencing issues, thus upon resentencing the court may not treat the Florida offense as a prior sentence.

United States v. Doe, 18 F.3d 41 (1st. Cir. 1994). The district court did not err in departing from the sentencing guideline range of 21 to 27 months to 72 months of imprisonment for possessing a gun after a previous felony conviction; the district court found that the guideline range did not adequately reflect the defendant's prior criminal record. The court found that a lawful basis for departure included one of the defendant's prior dangerous offenses, which was already counted under the criminal history section. Despite finding some dismal truth in the defendant's assertion that the nature of an earlier gun crime is not special enough to warrant a departure, the court did not believe that the "felon in possession" guideline automatically rules out consideration of a departure based on dangerous features of an offense. The court also accepted as a basis for departure the defendant's uncounted, juvenile dissimilar offenses. The defendant asserted that the guidelines forbid criminal history departures, where, as here, the departure rests on a juvenile's uncounted criminal conduct. *See* United States v. Samuels, 938 F.2d 210 (D.C. Cir. 1991); United States v. Thomas, 961 F.2d 1110 (3d Cir. 1992). Section 4A1.2, comment. (n.7) does not mention a departure for the presence of uncounted, earlier, dissimilar conduct. This absence of guidance, coupled with the Commission's statement that the guidelines "do not limit the kinds of factors, whether or not mentioned anywhere else in the guidelines that could constitute grounds for departure in an unusual case," allows the district court to depart based on uncounted juvenile dissimilar convictions. Moreover, the district court's reliance upon subsequent guidelines amendments to provide an analogous range was lawful.

United States v. Gray, 177 F.3d 86 (1st Cir. 1999). The district court did not err in assessing one point for the defendant's prior adjudication for theft, even though the state law bars consideration of the adjudication by "any court subsequently sentencing the juvenile after the juvenile has become an adult." It is not clear that the state statute was intended to prevent federal courts from counting such adjudications at sentencing, and if that were the case, the law would fail under the Supremacy Clause. States may not "dictate how the federal government will vindicate its own interests in punishing those who commit federal crimes."

The district court did not err in assigning one criminal history point for a misdemeanor conviction the defendant received without being represented by counsel. Because the defendant received only time-served for the offense, the district court stated that the defendant bore the burden of proving that he had not waived his right to counsel. The defendant presented a copy of the docket sheet showing that the defendant was arrested and pled guilty on the same day and there was not indication that the defendant was represented by counsel. The defendant did not testify at

the sentencing hearing and did not submit a sworn affidavit that he had not waived counsel. The defendant wrongfully assumed that the silent docket would shift the burden to the government. The defendant's "proof of a defective conviction was inadequate."

United States v. Morillo, 178 F.3d 18 (1st Cir. 1999). The district court did not err in counting as a prior sentence a state court sentence of "a continuance without a finding" (CWOF) for violating a domestic violence restraining order. The defendant filed an "admission to facts sufficient for a finding of guilty" and executed a written waiver of his constitutional rights. The defendant was required to complete one year of unsupervised probation, during which he was charged in federal court with drug distribution. The court assessed one point for the CWOF under §4A1.1(c) and two points under §4A1.1(d) because the defendant was arrested for the federal offense while on CWOF probation. The CWOF amounted to a diversionary disposition resulting from an admission of guilt under §4A1.2(f) because under state law the defendant's "admission" is considered a "tender of a plea of guilty."

United States v. Nicholas, 133 F.3d 133 (1st Cir. 1998). The district court did not err in counting, for criminal history purposes, the defendant's "admission to sufficient facts" on Massachusetts state charges of larceny and forgery, a procedure the state labeled a "continuance without finding." Under the Massachusetts system in effect at the time, an "admission to sufficient facts" meant an admission to facts sufficient to warrant a finding of guilty.

United States v. Troncoso, 23 F.3d 612 (1st Cir. 1994), *cert. denied*, 513 U.S. 1116 (1995). In addressing an issue of first impression, the circuit court affirmed the lower court's determination that the defendant's state sentence for sale of cocaine was a "prior sentence" within the meaning of §4A1.2. The defendant was in the United States illegally after he had been previously deported in 1988. He was convicted on a state offense for the sale of cocaine for which he received a suspended sentence in April 1993. In August 1993, he was convicted of violating 8 U.S.C. § 1326 based on his earlier deportation and was sentenced in August 1993. He argued that the state offense of selling cocaine was part of the instant offense because he was arrested for the state offense while committing the federal offense. The circuit court joined the Sixth and Tenth Circuits in concluding that the relevant inquiry is "whether the `prior sentence' and the instant offense involve conduct that is severable into two distinct offenses." *See* United States v. Beddow, 957 F.2d 1330 (6th Cir. 1992); United States v. Banashefski, 928 F.2d 349 (10th Cir. 1991). Since the state drug conviction required proof of different elements from the immigration offense, the two constituted severable offenses and the state conviction was properly determined to be a "prior sentence" for criminal history purposes.

§4A1.3 Adequacy of Criminal History Category (Policy Statement)

United States v. Chapman, 241 F.3d 57 (1st Cir. 2001). The district court's upward departure pursuant to USSG 4A1.3 on grounds that the defendant's criminal history was underrepresented was not erroneous. The defendant argued that the district court did not provide a sufficient rationale for the five-level departure, making a determination based solely on his criminal history score without considering the nature and context of his prior convictions. Understanding that there was no specific test for determining the reasonableness of a decision, the

First Circuit did not require a detailed analysis of a sentencing decision such as "'explaining in mathematical or psuedo-mathematical terms each microscopic choice made in arriving at a precise sentence,'" but merely required a reasonable justification from which the appellate court can "'gauge the reasonableness of the departure's extent.'" *Id*. at 64 (quoting United States v. Emery, 991 F.2d 907, 913 (1st Cir. 1993). In light of the deferential standard of review, the court found that, in addition to excessive criminal history points, the concern the district court expressed regarding the defendant's "consistent recidivism" and "violent nature" of the defendant's burglaries represented sufficient reasoning for the departure. *Id*. at 64. Moreover, compared to prior First Circuit upward departures under USSG 4A1.3, the 18 percent increase in sentence was relatively minor. *See, e.g.*, United States v. Brewster, 127 F.3d 22, 31 (1st Cir. 1997) (affirming an approximately 50 percent increase for uncounted prior convictions and uncharged domestic violence); United States v. Hardy, 99 F.3d 1242, 1253 (1st Cir.1996) (affirming a 300 percent upward departure); United States v. Black, 78 F.3d 1, 7-8 (1st Cir. 1996) (affirming an approximately 30 percent increase on the basis of a criminal history score of 21); United States v. Doe, 18 F.3d 41, 48-49 (1st Cir.1994) (affirming about a 167 percent increase in sentence); Emery, 991 F.2d at 914 (affirming about a 41 percent increase on the basis of a criminal history score of 20); United States v. Brown, 899 F.2d 94, 96 (1st Cir.1990) (affirming an approximately 133 percent departure on the basis of a criminal history score of 20); United States v. Diaz-Villafane, 874 F.2d 43, 51-52 (1st Cir. 1989) (affirming a 264 percent upward departure).

United States v. Snyder, 235 F.3d 42 (1st Cir. 2000), *cert. denied*, 121 S.Ct. 2205 (2001). The district court did not err when it refused to depart downward under USSG 4A1.3 on grounds that the defendant's criminal history category overstated the severity of his criminal record. The defendant argued that the district court failed to recognize his USSG 4A1.3 request for downward departure because the district court mistook his claim for an argument for departure based on extraordinary rehabilitation. Rejecting the defendant's argument, the court ruled that there was no evidence to show that the district court misunderstood the request. Furthermore, the defendant's record of violent crime justified the sentence. The sentence was affirmed.[10]

United States v. Brewster, 127 F.3d 22 (1st Cir. 1997). The district court did not err in departing upward based on defendant's lengthy history of uncharged spousal abuse, even though this conduct was dissimilar to the defendant's offense of conviction. The court of appeals held that a departure based on the inadequacy of a defendant's criminal history score can be based on prior dissimilar conduct that was the defendant was not charged with or convicted of, if the conduct is so serious that, unless it is considered, the criminal history category will be manifestly deficient as a measure of the defendant's past criminal behavior or likely recidivism.

See United States v. Fahm, 13 F.3d 447 (1st Cir. 1994), Rule 35, p. 65.

United States v. Mendez-Colon, 15 F.3d 188 (1st Cir. 1994). The district court departed upward after determining that the defendant's criminal history score underrepresented his criminal

[10]The defendant also argued that he should have been granted a departure under USSG 5K2.0 on the following grounds: erroneous jury instruction, improper payment to a witness by the government in exchange for testimony, and lack of a compelling interest to justify federal prosecution of a purely local matter. The court rejected all these arguments because none were relevant to sentencing.

history. The defendant claimed the extent of the departure was unreasonable and appealed. The circuit court found that although the district court properly explained why it was departing, it did not explain why this case was so egregious as to warrant departure beyond Category VI. The case was remanded for reconsideration in light of USSG 4A1.3 (p.s.) which directs the sentencing court to move horizontally across the sentencing table until it finds a criminal history category which provides a more appropriate punishment. The court should only depart beyond Category VI when the case involves "an egregious, serious criminal record," in which case the sentencing court must "explain carefully" why the circumstances are "special enough" to warrant such a departure. §4A1.3 (p.s.).

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Fernandez, 121 F.3d 777 (1st Cir. 1997). The district court did not err in concluding that the defendant's prior conviction for assault and battery on a police officer qualified as a predicate crime of violence for career offender purposes. Although the defendant argued that, under Massachusetts law, the crime can include both violent and non-violent variants, the court of appeals held that the offense usually involves force against another, requires purposeful and unwelcome contact with a person the defendant knows to be a law enforcement officer on duty. The fact that violence and a serious risk of physical harm are all likely to accompany an assault and battery upon a police officer was sufficient to make the crime, categorically, a crime of violence.

United States v. Mangos, 134 F.3d 460 (1st Cir. 1998). The district court did not err in counting the defendant's prior conviction under Massachusetts law for assault and battery as a crime of violence for career offender purposes. The court of appeals examined the elements of assault and battery under Massachusetts common law, noting that a battery may be "harmful" or merely "offensive." Because the state law included both violent and arguably non-violent offenses, the court looked to the charging document to determine that the crime of which the defendant was convicted was a crime of violence.

United States v. Santos, 131 F.3d 16 (1st Cir. 1997). The district court was correct in concluding that the defendant's act in sending a threatening letter to the President of the United States was a crime of violence for career offender purposes. The court of appeals noted that the offense has as an element the threatened use of physical force against another and held that it was irrelevant that the defendant either did not intend to carry out the threat or lacked the ability to do so.

United States Supreme Court

United States v. LaBonte, 520 U.S. 751 (1997). The Supreme Court resolved a split among the Courts of Appeals, deciding that Amendment 506, promulgated by the Sentencing Commission, amending commentary to USSG 4B1.1, the career offender guideline, is "at odds with the plain language of [28 U.S.C.] § 994(h)." In 28 U.S.C. § 994(h), Congress directed the Commission to

"assure" that prison terms for categories of offenders who commit a third felony drug offense or crime of violence be sentenced "at or near the maximum term authorized" by statute. The Supreme Court held that by the language "maximum term authorized," Congress meant the maximum term available for the offense of conviction, including any applicable statutory sentencing enhancements. The enhanced penalty, from 20 to 30 years imprisonment, is brought before the court by the prosecutor by filing a notice under 21 U.S.C. § 851(a)(1). The amendment to USSG 4B1.1's commentary at note 2 had provided that the unenhanced statutory maximum should be used, in part because the unenhanced statutory maximum "represents the highest possible sentence applicable to all defendants in the category" because section 851(a)(1) notices are not filed in every applicable case. The Supreme Court responded that "Congress surely did not establish enhanced penalties for repeat offenders only to have the Commission render them a virtual nullity." "[T]he phrase `at or near the maximum term authorized' is unambiguous and requires a court to sentence a career offender `at or near' the `maximum' prison term available once all relevant statutory sentencing enhancements are taken into account." The judgment of the First Circuit at 70 F.3d 1396 (1st Cir. 1995) is reversed. The Commission's amended commentary is at odds with the plain language of the statute at 28 U.S.C. § 994(h), and "must give way." Cf. Stinson v. United States, 508 U.S. 36, 38 (1993) (Guidelines commentary "is authoritative unless it violates the Constitution or a federal statute").

§4B1.2 Definitions of Terms Used in Section 4B1.1

See United States v. Damon, 127 F.3d 139 (1st Cir. 1997), §2K2.1, p. 17.

United States v. Dueno, 171 F.3d 3 (1st Cir. 1999). The district court erred in counting as a career offender predicate the defendant's prior conviction for breaking and entering. The statute defining the offense made it a crime to "in night time, break and enter a building, ship, vessel, or vehicle, with intent to commit a felony." When a statute encompasses conduct that would constitute a crime of violence and conduct that would not, the court "may not hold a mini-trial on the particular facts underlying the prior offense to determine whether the defendant's conduct was violent," although it may "peek beneath the coverlet" to examine the indictment, complaint, and/or jury instructions. Here, it was not clear from the complaint whether the defendant entered a dwelling or a vehicle. Although the presentence report described the prior offense as an invasion into a home followed by vandalism, the description was based on a police report that was not part of the state court file. Because the evidence is insufficient as a matter of law to support finding that the prior conviction constituted a crime of violence, the case was remanded.

See United States v. Sherwood, 156 F.3d 219 (1st Cir. 1998), *cert. denied*, 119 S. Ct. 888 (1999), §2K2.1, p. 19.

§4B1.4 Armed Career Criminal

United States v. Ellis, 168 F.3d 558 (1st Cir. 1999). The district court erred in finding that the defendant possessed weapons "in connection" with a controlled substance offense under USSG 4B1.4(b)(3)(A). The defendant was convicted at trial under 18 U.S.C. § 922(g)(1) (felon in possession of a shotgun, revolver, or ammunition) and 18 U.S.C. § 841(a)(1), 841(b)(1)(C)

(cultivating marijuana). During a search pursuant to a warrant, agents discovered 65 marijuana plants in a secret compartment in a detached garage. The weapons in question were found nowhere near the marijuana in a bureau in a the defendant's bedroom. The government admitted that it was difficult to get to the weapons because of furniture in the room, which suggests that the weapons were largely inaccessible. The government argued unsuccessfully on appeal that the there was a sufficient nexus connecting the weapons to the marijuana because (1) 80 percent of drug crime in Maine involve firearms violations; (2) the defendant hid his crop; and (3) marijuana is worth $2,000 per pound. The district court failed to make explicit findings to support the enhancement.

United States v. Fortes, 141 F.3d 1 (1st Cir.), *cert. denied*, 118 S. Ct. 2387 (1998). Possession of a sawed-off shotgun is a "violent felony," for purposes of the Armed Career Criminal Act. The court of appeals held that, although possession of a firearm by a felon is not a violent felony, certain specialized weapons, such as silencers, machine guns, and sawed-off shotguns, have been found by Congress to be inherently dangerous and lacking in lawful purpose. The court relied on analogies to the career offender guideline's definition of "crime of violence."

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.2 Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

United States v. Ortiz-Santiago, 211 F.3d 146 (1st Cir. 2000). The district court erred when it refused to sentence the defendant under the safety valve provision, pursuant to §5C1.2. The defendant pled guilty to conspiracy and drug charges stemming from two smuggling incidents. Despite the fact that the defendant satisfied the qualifying criteria stipulated in USSG 5C1.2, the district court refused to impose the safety valve on grounds that the plea agreement, which prohibited "'adjustments to the offense level'" beyond those "expressly delineated in the [a]greement," prohibited such application. *Id*. at 151. In reversing this decision, the court found that the agreement, which addresses adjustments, does not preclude the use of the safety valve. Whereas adjustments, which are included in Chapter Three of the Sentencing Guidelines, address offense levels, Chapter Five, which encompasses the safety valve under USSG 5C1.2, consists of "other provisions that guide the ultimate sentencing determination." *Id*. The safety valve's intent is to limit the application of mandatory minimum sentences, not to per se affect the offense level. Consistent with Congress's intentions when it established the safety valve, the court ruled that if a defendant satisfies the criteria for the safety valve, the sentencing court is required to impose it. Because "the safety valve is a congressional device[, t]he court cannot reject it on equitable grounds, but must sift through the statutory criteria and, if it determines that those criteria have not been met, must elucidate specific reasons why the provision does not apply." *Id*. at 152. The court remanded the case for resentencing.

United States v. Woods, 210 F.3d 70 (1st Cir. 2000).[11] The district court did not clearly err when it denied the defendant's safety valve request under USSG 5C1.2 on grounds that the defendant did not "truthfully provide to the Government all information and evidence ... concerning the offense." The defendant was convicted of attempting and conspiring to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2. Affirming the decision, the court found that the defendant's history of involvement in drug conspiracies, including weekly cocaine sales of 5,000 kilograms, reasonably implied that the defendant knew more information than he disclosed, such as the identities of other participants in the drug distributions.

United States v. Jimenez-Martinez, 83 F.3d 488 (1st Cir. 1996). The First Circuit, in an issue of first impression, held that the safety valve (§5C1.2(5)) requires the defendant to provide information to the prosecutor, not to the probation officer. The district court denied the defendant

[11]The defendant also argued that the district court should have sentenced him based on two kilograms of cocaine, the amount he had intended to purchase, and not four kilograms, which the undercover officer urged him to buy. The court found that this single transaction did not represent an "extreme and unusual case" of sentencing factor manipulation. *Id*. at 75 (quoting United States v. Montoya, 62 F.3d 1, 4 (1st Cir. 1995)). The transaction involved a reasonable market price, the undercover agents did not pressure the defendant or show any indication of an illegitimate motive, and the defendant was a seasoned drug dealer.

the safety valve because he did not provide information to the "Government" as required under USSG 5C1.2(5). The defendant appealed, arguing that his disclosure to the probation office satisfied the requirement of "providing information to the Government." §5C1.2(5). The circuit court concluded that the "Government" in USSG 5C1.2(5) and section 3553(f)(5) refers to the prosecuting authority rather than the probation office. The circuit court noted that USSG 5C1.2 is properly understood in conjunction with USSG 5K1.1. The court stated: "it seems evident that USSG 5K1.1's reference to the 'government' and to 'substantial assistance in the investigation or prosecution of another person' contemplates the defendant's provision of information useful in criminal prosecutions." The court added that the legislative history of USSG 5C1.2 requires disclosure of information that would aid prosecutors' investigative work. The circuit court noted that while full disclosure to the probation officer may assist the officer in preparing the defendant's presentence report, the probation officer does not create a presentence report with an eye to future prosecutions or investigations. Thus, the circuit court affirmed the district court's holding that the defendant did not satisfy the requirements of the safety valve.

United States v. Montanez, 82 F.3d 520 (1st Cir. 1996). The district court did not err in denying the defendant's request that he be sentenced under the safety valve provision of §5C1.2. However, the district court did err in concluding that §5C1.2 requires the defendant to offer himself for debriefing in order to satisfy the requirement that the defendant truthfully provide to the government all information and evidence that he possessed. In this case, the defendant pled guilty to conspiracy to distribute drugs and to five substantive counts of possession with intent to distribute. At sentencing, the defendant asked the court to apply the safety valve provision of USSG 5C1.2. In denying the defendant's request, the district court ruled that Congress had intended the safety valve for defendants who tried to cooperate by being debriefed by the government. On appeal, the defendant argued that no debriefing requirement exists. Agreeing with the defendant, the court noted that nothing in 18 U.S.C. § 3553(f) specifies the form or place or manner of the disclosure. However, because it is up to the defendant to persuade the district court that he has "truthfully provided" the required information and evidence to the government, the defendant who declines to offer himself for a debriefing takes a very dangerous course. When a defendant's written disclosure is drawn almost verbatim from a government affidavit, nothing prevents the government from pointing out suspicious omissions or the district court from deciding, as it did in this case, that it is unpersuaded of full disclosure.

United States v. Pacheco-Rijos, 96 F.3d 517 (1st Cir. 1996). The appellate court vacated and remanded the defendant's sentence for the district court to make supplemental findings to clarify on the record why it declined to grant the defendant relief from the mandatory minimum sentence pursuant to USSG 5C1.2. The defendant argued that she met the conditions set forth in the "safety value" provision and had explained the limits of her involvement in the conspiracy. Under USSG 5C1.2, a defendant may avoid the mandatory minimum and be sentenced below the applicable guideline term if the defendant meets the five requirements set forth in the provision, including cooperating fully with the government. The sentencing court held that the defendant had not cooperated fully with the government and had failed to negotiate for relief from the mandatory minimum in her plea agreement. The government did not specify details, however, concerning what the defendant had failed to provide. The circuit court noted that just because the government did not believe the defendant was a passive participant in the drug trafficking offense, did not

automatically make her ineligible for relief under the guidelines. The court noted that mere speculation as to the extent of the defendant's cooperation was not intended by the guidelines, and should not be enough to thwart the defendant's efforts to avoid the imposition of a mandatory minimum sentence.

United States v. Wrenn, 66 F.3d 1 (1st Cir. 1995). The district court did not err in denying the "safety valve" provision to the defendant. The defendant argued that he was entitled to a reduction of the ten-year mandatory minimum sentence under 18 U.S.C. § 3553(f), which in certain circumstances gives the trial court authority to impose a sentence shorter than the otherwise mandatory minimum sentence. The circuit court held that the defendant did not meet the fifth requirement of 18 U.S.C. § 3553(f), which requires a defendant to truthfully provide to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan. The defendant contended that by unwittingly being recorded by an undercover agent while discussing his plans to distribute cocaine and admitting the allegations by pleading guilty, he has satisfied the truthfulness requirement of 18 U.S.C. § 3353(f). The circuit court rejected the defendant's argument, holding that a defendant has not "provided" to the government such information and evidence if the sole manner in which the claimed disclosure occurred was through conversation conducted in furtherance of the defendant's criminal conduct which happened to be tape-recorded by the government as part of its investigation. In addition, the circuit court held that the requirement is not satisfied merely because a defendant pleads guilty.

Part D Supervised Release

§5D1.3 Conditions of Supervised Release

United States v. Brown, 235 F.3d 2 (1st Cir. 2000). The district court did not commit plain error when it required the defendant to abstain from consuming alcoholic beverages as a condition of his supervised release under USSG 5D1.3. The defendant pled guilty to distributing cocaine and cocaine base, in violation of 21 U.S.C. § 841(a)(1). The court first rejected the defendant's argument that he did not receive sufficient advance notice of the district court's intent to depart in this manner. Holding that advance notice is not necessary if the condition is one which falls within the range of standard conditions articulated in the guidelines, the court ruled that the condition imposed by the district court was merely an extension of USSG 5D1.3(c)(7), which prohibits excessive drinking. In Burns v. United States, 501 U.S. 129 (1991), the Supreme Court held that judges must give advance notice of their intentions to depart upward *sua sponte*. A defendant may rarely be able to claim unfair surprise when a court establishes conditions of supervised release because the guidelines contemplate that the court will tailor supervised release conditions to fit the offense and the offender. *See, e.g.*, United States v. Warren, 186 F.3d 358, 366 n.5 (3d Cir. 1999) (declining to apply Burns to a supervised release condition restricting travel); United States v. Mills, 959 F.2d 516, 519 (5th Cir. 1992) (deciding not to extend Burns to an occupational restriction that did not constitute an upward departure). The court then rejected the defendant's argument that the record revealed no reasonable rationale for imposing the condition. Several circuits have recognized that the "critical test is whether the challenged condition is sufficiently related to one or more of the permissible goals of supervised release." *Id*.

at 6; United States v. Bull, 214 F.3d 1275, 1278 (11th Cir.), *cert. denied*, 531 U.S. 1056 (2000); United States v. Crandon, 173 F.3d 122, 127 (3d Cir.), *cert. denied*, 528 U.S. 855 (1999); United States v. Carter, 159 F.3d 397, 400 (9th Cir.1998); United States v. Wilson, 154 F.3d 658, 667 (7th Cir. 1998). Finding that the facts reflected such a relationship with the defendant's criminal history, the safety of the general public, and deterrence from future crime, the court affirmed the district court's decision. The defendant's criminal record, which included several alcohol-related offenses, showed not only that the defendant had a longstanding history of alcohol abuse, but also that alcohol played a significant role in the commission of his prior offenses, reflecting the defendant's tendency to commit crimes while intoxicated. Furthermore, the district court's finding that the defendant became a drug dealer to support his addiction suggested that the condition might serve as a deterrent from future criminal activity.

United States v. Merric, 166 F.3d 406 (1st Cir. 1999). The district court did not err in imposing as a condition of supervised release a requirement that the defendant repay the government $3,000 in counsel fees paid for his representation. The condition is "reasonably related" to deterrence, which is a statutory consideration required by Congress. The defendant can afford to pay. The condition is consistent with the guidelines because §5D1.3 contains numerous repayment provisions. Although the Commission did not include payment of counsel fees as a standard condition of supervised release, the guideline does state that the court may impose other conditions consistent with 18 U.S.C. § 3583(d).

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. D'Andrea, 107 F.3d 949 (1st Cir. 1997). The district court did not err in assessing restitution against the defendant in the amount of $2.2 million, despite the defendant's claimed inability to pay. A sentencing court must consider the following factors in assessing restitution: amount of loss sustained by the victim; the financial resources of the defendant; the financial needs and earning ability of the defendant; the defendant's dependents and such other factors as the court deems appropriate. Despite the sentencing court's skepticism as to the defendant's ability to make restitution payments, the restitution order is valid. There is no requirement that the defendant be found to have an ability to repay the amount ordered. Instead, there must only be an indication that the sentencing court considered all of the relevant factors in making its determination.

United States v. Gilberg, 75 F.3d 15 (1st Cir. 1996). The district court erred in ordering the defendant to make restitution to banks whose loss, although caused by the defendant, was not caused by the specific conduct that was the basis of the offense of conviction. The defendant was convicted of conspiring to make false statements on 21 loan applications to three FDIC-insured financial institutions. Several additional banks, however, had been defrauded during the course of the defendant's criminal conduct. At sentencing, the district court noted that in 1990 Congress broadened the definition of "victim" in the Victim and Witness Protection Act ("VWPA") to include "any person directly harmed by the defendant's criminal conduct." 18 U.S.C. § 3663(a)(2). Applying 18 U.S.C. § 3663(a)(2), the district court ordered the defendant to make restitution to all

of the banks defrauded as a result of the criminal conduct. On appeal, the court noted that the retroactive application of 18 U.S.C. § 3663(a)(2) violated the Ex Post Facto Clause. In so holding, the court aligned itself with the courts of appeals that have already addressed the issue. *See, e.g.*, United States v. Elliot, 62 F.3d 1304, 1313-14 (11th Cir. 1995); United States v. DeSalvo, 41 F.3d 505, 515 (9th Cir. 1994), *cert. denied*, 117 S. Ct. 161 (1996); United States v. Jewett, 978 F.2d 248, 252-53 (6th Cir. 1992).

United States v. Hensley, 91 F.3d 274 (1st Cir. 1996). In considering this issue of first impression, the district court did not err in applying the 1990 amendments to the Victim and Witness Protection Act, which provide that "a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy or pattern." This amendment replaced prior court rulings which had limited restitution to "loss caused by the specific conduct that was the basis of the offense of conviction." The court required the defendant to make restitution payments to computer companies which were not listed as defrauded in the indictment under which the defendant was convicted, but whose contact with the defendant occurred during the same period and in the same manner as the fraud for which the defendant was convicted. The circuit court rejected the defendant's first argument that the instance of fraud not contained in the indictment did not fit within the "specifically defined" scheme for which he was responsible. The courts of appeals have consistently upheld restitutionary sentences based on evidence sufficient to enable the sentencing court to demarcate the scheme including its "mechanics . . . the location of the operation, the duration of the criminal activity and the methods used to effect it." United States v. Henoud, 81 F.3d 484, 489 n.11 (4th Cir. 1996); United States v. Turino, 978 F.2d 315, 318 (7th Cir. 1992), *cert. denied*, 508 U.S. 975 (1993). The determination as to whether there exists a unitary scheme should be based on the "totality of the circumstances." Undisputed evidence supported a finding in this case that the defendant undertook to defraud multiple computer companies by renting several drop boxes, placing all orders within a two week period, using interstate wires and paying for the goods with counterfeit instruments in each case.

United States v. Royal, 100 F.3d 1019 (1st Cir. 1996). The district court did not err in assessing $30,000 in restitution under §5E1.1. The defendant was convicted of one count of conspiracy and eight counts of mail fraud related to fraudulent student loan checks. A defendant may only be ordered to pay restitution for losses "caused by the specific conduct that is the basis of the offense of conviction." Hughey v. United States, 495 U.S. 411, 413 (1990). An individual convicted of a conspiracy, however, may be held responsible for conduct of co-conspirators in furtherance of the conspiracy that are reasonably foreseeable. Consequently, the defendant's restitution amount may include more than just the $9,870 attributable to the mail fraud counts. The defendant also contended that the district court based its loss determination on events occurring prior to his joining the conspiracy. As the defendant waived this issue by failing to raise it below, he must show an error affecting "substantial rights" to reverse the district court's determination. Noting that the district court ordered the defendant to pay only $30,000 of the original $500,000 restitution amount because of his inability to satisfy the entire amount, the appellate court found that it was unlikely that the figure would drop to less than $30,000 even if it had not included losses attributable to conduct occurring before the defendant joined the conspiracy.

Part G Implementing The Total Sentence of Imprisonment

§5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Parkinson, 44 F.3d 6 (1st Cir. 1994). The district court sentenced the defendant to 240 months' imprisonment to be served concurrently with his state sentence. The defendant argued that the sentence was actually a departure from his guideline range of 210-262 months because he was not credited for the 48 months he had already served on his state sentence. The appellate court held that time served in prior state custody is not included under USSG 5G1.3(c) in deciding whether a sentence is within the applicable guideline range. The Sentencing Commission "carefully distinguished a `sentence for the instant offense' from the `total punishment'." "This is appropriate even were the total punishment beyond the range calculated under USSG 5G1.2, because that section is a guide, not a mandate." Moreover, although the sentence was not a departure, a criminal history departure would have been justified in this case based on the defendant's 23 criminal history points and his commission of two bank robberies within one month of his release from a 15-year sentence.

United States v. Quinones, 26 F.3d 213 (1st Cir. 1994). The district court did not err in imposing consecutive sentences as an upward departure for the defendant's multiple carjacking offenses. The district court reasoned that the defendant's extreme conduct justified a sentence longer than the 180-month statutory maximum that Congress established for carjacking offenses, 18 U.S.C. § 2119(1), and imposed a sentence that was the equivalent of consecutive sentences based on the low end of the defendant's sentencing guideline range. The defendant argued that USSG 5G1.2 required the imposition of concurrent sentences. The circuit court joined the Ninth and Eleventh Circuits in concluding that the lower court possesses the power to impose consecutive or concurrent sentences in a multiple-count case. *See* United States v. Perez, 956 F.2d 1098 (11th Cir. 1992); United States v. Pedrioli, 931 F.2d 31 (9th Cir. 1991). However, that power to deviate from the standard concurrent sentencing paradigm should be classified as a departure and the lower courts must follow departure protocol. Although the district court was correct in determining that the defendant's conduct was significantly atypical, the circuit court remanded for clarification, directing the district court to provide reasons for the extent of the departure, or conduct a new sentencing hearing.

§5G1.3 Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

United States v. Ramirez, 252 F.3d 516 (1st Cir. 2001). The district court did not err when it concluded that it did not have the discretion under USSG 5G1.3 to credit the defendant's federal sentence for the time he had served for a related state conviction. The defendant pled guilty to marijuana distribution in violation of 21 U.S.C. §§ 841 and 846, as well as related money laundering charges. He had previously completed a state sentence for a related offense. The defendant argued that Application Note 2 to USSG 5G1.3, which allows for a credit adjustment when the federal sentence is imposed concurrently, granted the district court the authority to credit his federal sentence. However, the court found that "[a] defendant's eligibility for credit is derivative of his eligibility for a concurrent sentence" and a concurrent sentence can only be imposed when there is an *undischarged* term of imprisonment at the time of sentencing." *Id*. at

519. Consistent with the Second, Ninth, Fourth, and Tenth Circuits, the court ruled that because his state sentence was complete by the time of the federal sentencing, the defendant was not eligible for a concurrent sentence, and thus §5G1.3 did not apply. *See* United States v. Labeille-Soto, 163 F.3d 93, 99 (2d Cir. 1998); United States v. Turnipseed, 159 F.3d 383, 386-87 (9th Cir. 1998); *see also* United States v. McHan, 101 F.3d 1027, 1040 (4th Cir. 1996); United States v. Ogg, 992 F.2d 265, 266 (10th Cir. 1993).

United States v. Chapman, 241 F.3d 57 (1st Cir. 2001). The district court did not err by imposing consecutive sentences for revocation of supervised release and bank fraud under USSG 5G1.3. The defendant pled guilty to one count of bank fraud while on supervised release from a prior conviction. Consistent with the Fifth and Ninth Circuits, the First Circuit determined that Application Note 6 to USSG 5G1.3 regarding revocation requires that the sentence for the instant offense be imposed consecutively to that imposed for the revocation of the supervised release. United States v. Gondek, 65 F.3d 1, 3 (1st Cir. 1995);[12] *see also* United States v. Alexander, 100 F.3d 24, 26 (5th Cir. 1996); United States v. Bernard, 48 F.3d 427, 430-32 (9th Cir. 1995). The court added that consecutive sentences were necessary to effectively enforce the conditions of supervised release because concurrent sentences would provide no incremental punishment.[13]

United States v. Austin, 239 F.3d 1 (1st Cir. 2001). The district court did not double count, punishing the defendant twice for the same conduct, under USSG 5G1.3(c). The defendant was convicted in a Massachusetts state court for crimes committed there while fleeing police after robbing a New Hampshire bank. Stemming from the same incident, he was later convicted of federal charges of bank robbery, use of a firearm in a crime of violence, possession of a firearm by a prohibited person, interstate transportation of stolen property, and interstate transportation of a stolen vehicle. The defendant argued that comments made by the state court judge showed that the state court held him accountable for conduct on which federal sentencing enhancements were based, violating USSG 5G1.3's goal of preventing duplicative penalties. Finding the state court's comments to be "oblique and ambiguous at best," the court ruled that the state court did not

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[12]At the time of the Gondek decision, the exact note was identified as USSG 5G1.3, comment. (n.4).

[13]There is a circuit split on this issue. Compare Second and Seventh Circuits that have determined that Application Note 6 does not preclude the district court from use of all discretion to impose concurrent sentences. *See* United States v. Maria, 186 F.3d 65 (2d Cir. 1999) (ruling that the plain language of the term "should" in the note, as well as in the cross-referenced USSG 7B1.3, indicates a suggestion or recommendation and not a mandate, and that an "incremental penalty" signifies a moderate additional penalty, less severe than a consecutive sentence); United States v. Walker, 98 F.3d 944, 945 (7th Cir. 1996) (noting a "strong presumption in favor of consecutive sentencing"). In dicta, the Tenth Circuit noted that while that circuit has not yet addressed the issue, it is unclear whether Application Note 6 has divested the district court from imposing concurrent sentences. United States v. Carver, 160 F.3d 1266, 1268 (n.1) (10th Cir. 1998) (expressing skepticism at defendant's claim that, based on Application Note 6, the district court has no discretion to impose concurrent sentences). While not stated in the summary, the Eighth Circuit follows the First, Fifth, and Ninth Circuits. *See* United States v. Goldman, 228 F.3d 942, 944 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 1149 (2001) (following its unpublished decision in United States v. Dungy, No. 95-3997, 1996 WL 193150, at *1 (8th Cir. Apr. 23, 1996), "that notwithstanding the Sentencing Commission's use of the word 'should' rather than 'shall,' Application Note 6 is mandatory and requires consecutive sentences.").

sentence defendant for any conduct outside the scope of the state convictions. *Id*. at 6. Therefore, because the state had not already punished the defendant for conduct the federal sentence had fully taken into account, there was no risk of duplicative punishment in violation of USSG 5G1.3.

United States v. Caraballo, 200 F.3d 20 (1st Cir. 1999). The district court appropriately exercised its discretion under USSG 5G1.3(c) to impose most of the defendant's sentence consecutively to his state conviction. The defendant pled guilty to charges of conspiracy to commit interstate transportation of stolen property, in violation of 18 U.S.C. § 371. The 22 burglaries listed in the indictment as overt acts in furtherance of the conspiracy included an unsuccessful burglary for which the defendant had pled guilty in state court.[14] The defendant argued that his entire sentence should have been concurrent, under USSG 5G1.3(b), because, as "relevant conduct" under USSG 1B1.3, the reckless endangerment enhancement for the state- convicted burglary had been "fully taken into account" when the district court determined the offense level. However, the court found that not all "relevant conduct" under USSG 1B1.3 satisfies the USSG 5G1.3(b) standard of being "fully taken into account." If the Sentencing Commission had intended for all "relevant conduct" to satisfy USSG 5G1.3(b), the Commission would have used that term to define the USSG 5G1.3(b) standard. The court found that "only [the] relevant conduct that has resulted in – or that *could have* resulted in – a change in the instant offense's 'offense level'" has been "fully taken into account" under USSG 5G1.3(b). *Id*. at 27 (citation omitted). In other words, the district court is only required to impose concurrent sentences when the "undischarged term of imprisonment 'resulted from offense(s) that' not only were 'relevant conduct' *vis-á-vis* the instant offense, but also impacted (or could have impacted) the defendant's offense level or criminal history category." *Id*. As such, the unsuccessful burglary, whose zero-loss failed to affect either the defendant's criminal history or offense level calculation in the federal sentence, constituted relevant conduct that was not "fully taken into account" under USSG 5G1.3(b). Moreover, if the defendant's instant offense incorporates multiple offenses, not all of which warrant concurrent sentencing, USSG 5G1.3(c) should apply so that the district court can consider "all of the potential permutations and complexities that arise in a multiple-offenses context." Applying USSG 5G1.3(b) would impose concurrent sentences in cases where the USSG 5G1.3(b) rationale would not apply. *Id*. at 28 (quoting United States v. Kimble, 107 F.3d 712, 715 (9th Cir. 1997). While both the state and federal convictions accounted for the unsuccessful robbery, the federal sentence punished the defendant's role in the conspiracy to commit successful burglaries (resulting in losses), as well as an aborted murder plot. The state punished the defendant solely for the unsuccessful burglary. The court affirmed the sentence, finding that the district court appropriately applied USSG 5G1.3(c), consecutive sentences for the unsuccessful burglary.

United States v. Gondek, 65 F.3d 1 (1st Cir. 1995). The circuit court affirmed the district court's decision to run the defendant's federal sentence consecutively to the state sentence imposed after the state parole violation. The defendant was on state parole at the time of the federal firearms possession offense and the district court followed the directive that the sentence for the

[14]The defendant also pled guilty in state court to assaulting a police officer, which is not at issue here because the district court imposed the enhancement for assaulting the officer concurrent to the state conviction.

new offense "should be imposed to be served consecutively to the term imposed for the violation of . . . parole. . . ." The defendant argued that a consecutive sentence was not mandatory and should not have been ordered. The circuit court noted that USSG 5G1.3(c), Application Note 4 applied directly to this case. Application Note 4 reads: "If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense should be imposed to be served consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release." The circuit court joined the Ninth Circuit in ruling that the language of Application Note 4 is mandatory. United States v. Bernard, 48 F.3d 427 (9th Cir. 1995). The circuit court held that Application Note 4 is mandatory because Note 4 represents the Commission's determination of what constitutes a "reasonable incremental punishment"; and noted that the situation is closely akin to the case of the defendant who commits a new offense while still in prison, the very situation in which §5G1.3(a) instructs that the new sentence is to be served consecutively.

United States v. Whiting, 28 F.3d 1296 (1st Cir.), *cert. denied*, 513 U.S. 956 (1994). The district court committed plain error when it imposed upon defendant Bartlett a sentence consecutive to his undischarged state sentence. The defendant was serving time for two state second degree murder offenses. The district court concluded that the conduct underlying the state convictions would have supported convictions for first degree murder; since he would be eligible for parole in 16 years the district court determined that a consecutive federal sentence was necessary. The lower court's failure to follow the strictures of USSG 5G1.3, which requires consecutive sentences only "to the extent necessary to achieve a reasonable incremental punishment for the instant offense," amounted to plain error because proper application of the guidelines could result in a different and more favorable sentence for the defendant.

Part H Specific Offender Characteristics

§5H1.1 Age (Policy Statement)

United States v. Jackson, 30 F.3d 199 (1st Cir. 1994). The district court erred in concluding that the defendant's age and the prospective length of sentence were adequate circumstances that warranted downward departure under the sentencing guidelines. The defendant was convicted of several drug related counts which qualified him for a sentence enhancement under 18 U.S.C. § 924(e). Instead of applying the enhancement, the district court departed downward from the specified sentence because it thought that the parameters set by the sentencing guidelines would be tantamount to a "life sentence" in view of the defendant's age. The government appealed, arguing that the reasons stated by the district court were legally insufficient to warrant a downward departure. The First Circuit held that neither the defendant's age nor the duration of his sentence or any combination of those factors are "mitigating circumstances of a kind, or degree, that are not adequately taken into consideration by the Sentencing Commission in formulating the Sentencing Guidelines." 18 U.S.C. § 3533(b).

§5H1.5 Employment Record (Policy Statement)

United States v. Thompson, 234 F.3d 74 (1st Cir. 2000). The district court erred when it departed downward under §5H1.5 based on the defendant's employment record. The defendant pled guilty to one count of distributing cocaine base, in violation of 21 U.S.C. § 841(a)(1). After struggling with the questions of what constituted the baseline and how to distinguish an extraordinary employment record, the district court decided that "'[i]n a sentencing regime whose aim is to eliminate unwarranted disparities between similarly situated offenders, ordinarily should be determined by comparing [the] defendant *with others convicted of the same crime*.'" *Id*. at 77 (quoting district court sentencing memorandum and judgment). Upon review of other distribution of cocaine base convictions throughout the jurisdiction from around the time of the offense through the interim before sentencing, paying close attention to offenders from the same housing project convicted in the same year, the district court concluded that the defendant's almost consistent employment since he withdrew from high school represented an extraordinary case warranting a downward departure. Vacating the sentence, the court ruled that the district court erred by limiting her comparison to convictions of crack cocaine sales. The court explained that the comparison should have focused on extraordinary cases involving employment records, not on convictions for distributing crack cocaine. "'A court should survey those cases where the discouraged factor [*e.g*., employment record] is present *without limiting its inquiry to cases involving the same offense,* and only then ask whether the defendant's record stands out from the crowd.'" *Id*. (quoting United States v. DeMasi, 40 F.3d 1306, 1324 (1st Cir. 1994)).

§5H1.6 Family Ties and Responsibilities, and Community Ties (Policy Statement)

United States v. Thompson, 234 F.3d 74 (1st Cir. 2000). The district court erred when it departed downward under USSG 5H1.6 based on defendant's family ties and responsibilities. Defendant had pled guilty to one count of distributing cocaine base in violation of 21 U.S.C. § 841(a)(1). After struggling with the questions of what constituted the baseline and how to distinguish a case of extraordinary family ties and responsibilities, the district court decided that "'[i]n a sentencing regime whose aim is to eliminate unwarranted disparities between similarly situated offenders, ordinarily should be determined by comparing [the] defendant *with others convicted of the same crime*.'" *Id*. at 77 (quoting district court sentencing memorandum and judgment). Upon review of other distribution of cocaine base convictions throughout the jurisdiction from around the time of the offense through the interim before sentencing, paying close attention to offenders from the same housing project convicted in the same year, the district court concluded that the defendant's relationship with and responsibilities to his family represented an extraordinary case warranting a downward departure. Vacating the sentence, the court ruled that the district court erred by limiting her comparison to convictions of crack cocaine sales. The court explained that the comparison should have focused on extraordinary cases of family ties and responsibilities, not on convictions for distributing crack cocaine. "'A court should survey those cases where the discouraged factor [*e.g.*, family ties and responsibilities] is present *without limiting its inquiry to cases involving the same offense,* and only then ask whether the defendant's record stands out from the crowd.'" *Id*. (quoting United States v. DeMasi, 40 F.3d 1306, 1324 (1st Cir. 1994)).

§5H1.11 Military, Civic, Charitable or Public Service; Employment Related Contributions; Record of Prior Good Works (Policy Statement)

United States v. DeMasi, 40 F.3d 1306 (1st Cir. 1994), *cert. denied*, 513 U.S. 1132 (1995). On the government's cross-appeal, the appellate court held that the district court erred in departing downward based on the defendant's history of charitable work and community service in comparison with that of the "the typical bank robber," rather than comparing him to "other defendants with comparable records of good works." The district court should have surveyed those cases where a factor ordinarily discouraged under USSG 5H1.11 is present, without limiting its inquiry to cases involving bank robbers, and only then ask whether the defendant's case was sufficiently unique to justify a departure.

Part K Departures

§5K1.1 Substantial Assistance to Authorities (Policy Statement)

United States v. Doe, 170 F.3d 223 (1st Cir. 1999). The district court denied the defendant's request for specific performance of a plea agreement, which provided that the government had "sole discretion" over whether to file a motion for a downward departure based on substantial assistance in two cases. The defendant had been sentenced in 1995 on one drug case and in a plea agreement for a later indictment, the government agreed to recommend a downward departure in both cases, if defendant provided substantial assistance. In addition to stating that the government would have "sole discretion" on whether to file a motion, the plea agreement stated that "the defendant's failure to 'make a case' shall not relieve the government of exercising its discretion" under Fed. R. Crim. P. 35(b) or USSG 5K1.1. At a hearing on the defendant's cooperation, the government alleged that the defendant's cooperation came too late; the defendant argued that the government failed to follow up on his information until the evidence was time-barred. The appellate court agreed with the judges in both cases who found that the defendant had not alleged that the government's failure to file a motion was the result of an unconstitutional bias. The appellate court did not decide whether Wade v. United States, 504 U.S. 181 (1992), authorizes challenges if the government's refusal to file a motion is based on "bad faith" when there is a signed plea agreement. In this case, the defendant could not show "bad faith." His allegations amounted to "simply . . . a claim that the government acted carelessly or unreasonably." Further, in the case not under consideration by the appellate court, the district court found that the defendant did not provide substantial assistance. Thus, the defendant's contract claim on the instant claim is barred by that finding.

United States v. Garcia-Velilla, 122 F.3d 1 (1st Cir. 1997). The government was not compelled under the terms of its plea agreement with the defendant to recommend a substantial assistance downward departure. The defendant had breached the plea agreement by refusing to provide the names of those who had supplied her with cocaine while she was out on bail, in derogation of her obligation under the agreement to provide all information known to her regarding any criminal activity.

United States v. Torres, 33 F.3d 130 (1st Cir. 1994), *cert. denied,* 513 U.S. 1098 (1995). The circuit court rejected the defendant's equal protection challenge to the substantial assistance rubric under 18 U.S.C. § 3553(e) and USSG 5K1.1. The First Circuit concluded that the fact that a low-level drug offender with little substantial assistance to offer may receive a higher sentence than a high-level drug dealer who has plenty of information to trade does not render the substantial

assistance departure unconstitutional. Rather, the equal protection challenge is easily defeated because the government's interest in offering leniency in exchange for useful information is rationally based. The circuit court also rejected the defendant's claim that the substantial assistance departure conflicts with Congress's objective of achieving fairness in sentencing. The circuit court reasoned that examination of the various statutes in which Congress has referred to the purposes of sentencing reveals a cross-current of objectives other than fairness. In promulgating section 3553(e), Congress specifically expressed its intent to provide these departures. The circuit court added that an argument not raised but worth noting is whether the definition of substantial assistance under USSG 5K1.1 as only that assistance which results in further arrests or prosecutions is too narrow and should include "good faith" efforts to assist.

§5K2.0 Grounds for Departure (Policy Statement)

United States v. Amirault, 224 F.3d 9 (1st Cir. 2000). The district court did not err when it departed upward under USSG 5K2.0 after the defendant pled guilty to possessing items containing visual depictions of minors engaged in sexually explicit conduct. Drawing an analogy to USSG 2G2.2(b)(4), which provides for an increase in offense level if the defendant participates in a pattern of conduct involving sexual abuse of minors, the district court departed upward because the defendant had sexually assaulted his minor sisters-in-law 20 years earlier. The defendant raised several objections to the departure. The court first rejected the defendant's argument that the guidelines prohibited departures based on analogies to other guidelines, allowing only departures based on relevant conduct under USSG 1B1.3. Section 1B1.3, which pertains to adjustments to the offense level based on a defendant's overall behavior, is different from departures for misconduct not leading to a conviction, permitted by the guidelines so long as the misconduct "relate[s] meaningfully to the offense of conviction." *Id*. at 12*; see also* United States v. Kim, 896 F.2d 678, 684 (2d Cir. 1990). Finding that the nude photographs of the sisters-in-law found in the defendant's child pornography collection linked the instant conviction to the previous assaults, the court affirmed the upward departure. The court also rejected the defendant's argument that the 20-year-old incident occurred too long ago to be counted. Continuing with the analogy to USSG 2G2.2, the court found that there is no temporal limit to the use of such misconduct for enhancement purposes. "'If the defendant engaged in the sexual abuse or exploitation of a minor *at any time* (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) . . . an upward departure may be warranted.'" *Id*. at 13 (quoting USSG 2G2.2, comment. (n.2)). Next, despite finding credibility in the defendant's argument challenging the reliability of the victims' statements, made 20 years after the incidents and soon after he and their sister decided to divorce, and his unrecorded and unconfirmed alleged confessions made immediately after his arrest, the court ruled that it could not overcome the deferential standard for reviewing the district court's findings, sufficiently supported by the record. The defendant next objected to the extent of the departure. Upholding the five-level departure, the court explained that not only has the First Circuit upheld more severe departures than this 70 percent increase, but that USSG 2G2.2(b)(4) recommends a five-level increase; the sexual abuse guideline (§2A3.1) would have demanded a significantly higher sentence than that imposed by the district court. Finally, the defendant argued that the departure violated *ex post facto* protections and due process. Citing Supreme Court precedent establishing that consideration of prior misconduct at sentencing only punishes the instant offense, the court ruled that the departure was not an *ex post facto* violation, despite the fact that the conduct occurred before

either possession of child pornography became a federal crime or the sentencing guidelines were enacted, because the enhancement punished the current crime of possession of child pornography. *See* United States v. Witte, 515 U.S. 389, 401 (1995) ("[C]onsideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted."). The court also extended to the area of departures the principle that "a sentencing court may consider as relevant conduct acts which could not be independently prosecuted because of the passage of time" and found that the departure did not violate his constitutional right to a statute-of-limitations defense. 224 F.3d at 15 (citing United States v. Valenti, 121 F.3d 327, 334 (7th Cir. 1997) (listing supporting cases)); *see also* United States v. Dolloph, 75 F.3d 35, 40 (1st Cir. 1996) (allowing consideration, as relevant conduct, of acts not tried within the court's jurisdiction). Furthermore, due process does not prohibit sentencing courts from considering prior conduct when evaluating an upward departure. *See also* United States v. Ortiz-Santiago, 211 F.3d 146, 148 (1st Cir. 2000) (holding that it did not have jurisdiction to hear appeal because defendant failed to show that the district court mistakenly believed it had no authority to depart based on defendant's "responsibility to care for his ailing father").

See United States v. Bradstreet, 135 F.3d 46 (1st Cir.), *cert. denied*, 118 S. Ct. 1805 1998), Ch. 1, Pt. A, p. 1.

United States v. Brennick, 134 F.3d 10 (1st Cir. 1998). The district court departed downward in sentencing the defendant for failure to pay to the government his employees' wage and social security taxes. The court of appeals held that the first reason cited by the district court for departure, the defendant's intent to eventually pay the taxes, could take the case out of the heartland of the tax evasion guideline. Because usually a tax evader intends to deprive the government of the taxes owed, the defendant's apparent intent only to delay payment was not typical of the heartland case of tax evasion. The second reason cited, however, that the tax loss to the government overstated the seriousness of the offense because the losses were due to multiple causes, was not a proper basis for departure. The district court "borrowed" this departure factor from the fraud guideline, but the court of appeals held the factor was inappropriate. The court of appeals remanded for the district court to explain more adequately the decision to depart and extent of departure.

United States v. Craven, 239 F.3d 91 (1st Cir. 2001). The district court erred when it departed downward under USSG 5K2.0 for extraordinary presentence rehabilitation based in large part on an *ex parte* conversation with a court-appointed expert. The court ruled that an *ex parte* conversation with a court-appointed expert could not be used to obtain critical information upon which the court would rely in determining a sentence. If the district court needs additional information, "it must either (1) make a written request for a supplemental report" which it must provide to all parties pursuant to 18 U.S.C. § 3552(d), "or (2) bring the expert into court to be questioned in the presence of the parties." *Id*. at 102. The court further determined that because the *ex parte* conversation tainted the basis of the departure decision, the court could not decide whether the departure was warranted. The conversation dealt with a "substantive sentencing matter . . . [which] was plainly determinative of the court's decision to depart . . . [and] the government had no realistic opportunity to challenge the expert's conclusions . . . ." *Id*. at 103. Furthermore, the district court summary of the conversation was the only available record of the

conversation. Finally, applying Seventh Circuit rationale, the court held that a different judge should resentence the defendant because it would be too difficult for the current judge to maintain an appearance of impartiality and disregard the information she had received during the *ex parte* conversation. *See* Edgar v. K.L., 93 F.3d 256, 259 (7th Cir. 1996) (disqualifying a judge because the unjustified *ex parte* discussions with court-appointed experts were not in the record and thus "[w]hat information passed to the judge, and how reliable it may have been, [were] unknowable"). The court annulled the departure, vacated the sentence, and remanded for resentencing before a different judge.

United States v. DeLeon, 187 F.3d 60 (1st Cir. 1999). The district court's refusal to grant a downward departure was not based on the court's belief that a defendant's status as a deportable alien is not a valid ground for a downward departure. The court stated that he did not find sufficient grounds to depart on that basis, even if it had the authority. Because the refusal to grant the departure was a valid, discretionary refusal to depart, the appellate court left open the question as to whether a defendant's status as a deportable alien could be a valid basis for departure.

United States v. Dethlefs, 123 F.3d 39 (1st Cir. 1997). The district court erred in departing downward based on the defendants' decision to plead guilty. The district court viewed the guilty pleas as conduct facilitating the administration of justice, in the light of the significant conservation of judicial resources that resulted in the complex drug and tax case. The court of appeals held that, in theory, a defendant's early agreement to plead guilty and ancillary conduct may have consequences so fay beyond ordinary expectations as to warrant a downward departure for facilitating the administration of justice; however, the factors cited by the district court (the length and complexity of the anticipated trial, the need to relocate the proceedings) did not make the case sufficiently atypical to warrant the departures made by the district court.

United States v. Gifford, 17 F.3d 462 (1st Cir. 1994). The district court erred in determining it lacked discretion to grant the defendant a downward departure based on his extraordinary mental and emotional condition, USSG 5H1.3, 5K2.13, and on the fact that his conduct amounted to a single aberrant act. The defendant was convicted of the illicit receipt of child pornography after undercover postal inspectors repeatedly contacted the defendant concerning the illicit material. Relying on United States v. Rivera, 994 F.2d 942 (1st Cir. 1993), the First Circuit found that the defendant's case presented an unusual set of circumstances which took his case outside the heartland of the guidelines. The defendant was without the requisite mens rea; he did not recognize the socially unacceptable nature of the materials, he believed all along that the materials were lawful for trade and he assumed that the advertisers (the undercover postal inspectors) who solicited him were acting legally. Since the record made clear that the district court believed it was without the discretion to depart, the court of appeals vacated and remanded for resentencing.

United States v. Grandmaison, 77 F.3d 555 (1st Cir. 1996). In considering an issue of first impression, the First Circuit held that to determine whether an offense constitutes a single act of aberrant behavior, the court should review the totality of the circumstances. Two different standards have been employed by the circuit courts to determine whether the conduct at issue constitutes aberrant behavior. The narrow view finds aberrant behavior only for "spontaneous or thoughtless" acts, rather than actions taken after substantial planning. *See* United States v.

Marcello, 13 F.3d 752 (3d Cir. 1994); United States v. Glick, 946 F.2d 335 (4th Cir. 1991); United States v. Williams, 974 F.2d 25 (5th Cir. 1992), *cert. denied*, 507 U.S. 934 (1993); United States v. Carey, 895 F.2d 318 (7th Cir. 1990); United States v. Garlich, 951 F.2d 161 (8th Cir. 1991). The more expansive view calls for the court to make its determination based on the totality of the circumstances. *See* United States v. Takai, 941 F.2d 738 (9th Cir. 1991) (affirming downward departure based on a lack of pecuniary gain, no criminal record and enticement by a government agent); *see also* United States v. Fairless, 975 F.2d 664 (9th Cir. 1992) (affirming downward departure based on defendant's manic depression, suicidal tendencies and recent unemployment); United States v. Pena, 930 F.2d 1486 (10th Cir. 1991) (finding long-term employment, lack of abuse or prior distribution of controlled substances and economic support of family as factors indicating an aberration). The First Circuit held that the court should review such departure determinations under the totality of the circumstances. The circuit court specifically stated a few of the factors that may be considered: defendant's pecuniary gain, charitable activities, prior benevolent actions, and steps taken to mitigate the effects of the crime. The circuit court noted that spontaneity and thoughtlessness may be considered but are not required elements, and that status as a first-offender may be considered, but would not warrant a departure in and of itself. The circuit court also noted that "single acts of aberrant behavior" can include conduct involving multiple criminal acts. The circuit court remanded the case to the district court for its determination of whether the defendant's actions constituted aberrant behavior under the totality of circumstances standard.

United States v. Hardy, 99 F.3d 1242 (1st Cir. 1996). The district court did not err in granting an upward departure based upon either the defendant's criminal history involving similar offenses or the type of weapons involved in the offense. With respect to defendant's prior criminal activity, USSG 4A1.3 specifically encourages upward departures based on reliable information that a defendant previously engaged in prior similar adult criminal conduct not resulting in a conviction. Given the defendant's recent, persistent and escalating record of violent behavior, the appellate court found it was not an abuse of discretion for the sentencing court to depart upward. In reaching this conclusion, the circuit court rejected the argument that the Commission's decision against making weapon type a specific offense characteristic under USSG 2K2.1 precluded a judicial finding that some types of weapons are more dangerous than others. In this particular case, the use and indiscriminate disposal of multiple weapons elevated the dangerousness of the offense, in keeping with the fact that heightened dangerousness occasioned by the usage and indiscriminate abandonment of the firearms is an encouraged factor for departure. Because this departure was based on both USSG 4A1.3 and 5K2.0, the court's departure from Level 18, Criminal History Category III to Level 18, Criminal History Category VI was justified as an unguided departure.

United States v. LeBlanc, 24 F.3d 340 (1st Cir.), *cert. denied*, 513 U.S. 896 (1994). The district court erred in granting the defendants' motion for downward departure. Although the defendants pled guilty to money laundering, 18 U.S.C. §§ 1856, 1857, the district court concluded that their criminal conduct was really gambling and departed downward. The circuit court disagreed and concluded that the lower court interpreted the scope of the money laundering statute too narrowly. The defendants' conduct did fall squarely within the "heartland" of a typical money laundering case; in addition to conducting an illegal gambling business, both defendants actively

laundered the money generated by the gambling business, instructing the gamblers to make their checks payable to fictitious payees and negotiating the checks.

United States v. Limberopoulos, 26 F.3d 245 (1st Cir. 1994). The district court misunderstood the basic objectives and interplay between the unlawful drug-trafficking statute, 21 U.S.C. § 841 and the unlawful drug-prescribing statute, 21 U.S.C. § 843, resulting in an incorrect downward departure. The district court's finding that section 843 only applies to pharmacists while section 841 applies to non-pharmacists was incorrect. The correct distinction between the two statutes is that section 843 punishes unlawful record-keeping by pharmacists and section 841 punishes the unlawful drug distribution by anyone, including pharmacists.

United States v. Maldonado, 242 F.3d 1 (1st Cir. 2001).[15] The district court erred by departing downward pursuant to USSG 5K2.0 on grounds of taxpayer expense. The defendant pled guilty to possession with intent to distribute cocaine and heroin, in violation of 21 U.S.C. § 841(a)(1), and the judge departed downward based on his concern about the "waste of taxpayer money" on someone who would be deported after he completed his sentence. *Id*. at 4. The court noted that United States v. Koon, 518 U.S. 81, 96 (1996), allows for consideration of extraordinary cases not specifically addressed by the Commission, and that, in extraordinary cases, the Guidelines have authorized consideration of expense. *See, e.g.*, USSG 5H1.1 (home confinement may be less costly than incarceration as a form of punishment for an elderly and infirm defendant); USSG 5H1.4 (home detention may be less costly than incarceration as punishment for a seriously infirm defendant). Four circuits have also supported deportability as a justification for departure in extraordinary cases. *See, e.g.*, United States v. Tejada, 146 F.3d 84, 88 (2d Cir. 1998) (per curiam); United States v. Farouil, 124 F.3d 838, 847 (7th Cir. 1997) (cited with approval in United States v. DeBeir, 186 F.3d 561, 569 (4th Cir. 1999)*; cf. also* United States v. Smith, 27 F.3d 649, 655 (D.C. Cir. 1994). Finding that the Commission was clearly aware that "deportable aliens commit crimes, that drug sentences are lengthy, and that prisons are expensive," the court ruled that the case was not extraordinary and thus the departure was impermissible. 242 F.3d at 5. The court remanded to the district court for resentencing.

United States v. Morrison, 46 F.3d 127 (1st Cir. 1995). The defendant was sentenced as a career offender. He asserted that he should be granted a downward departure from that sentence because he was not a typical career offender, and the criminal history category overrepresented his criminal history. He argued that the offense of conviction, a robbery, should be merged with one of the predicate offenses, because they were part of a "downward spiral" brought on by alcohol abuse and depression. The defendant argued that the district court judge's statement: "if I felt I had the authority to depart, I would[.]" showed that the district court mistakenly believed that it did not have the authority to depart. The appellate court held that in determining whether the sentencing court believed it lacked authority to depart, or whether it was merely refusing to exercise its

[15]The court also resolved an issue regarding whether a district court can resentence a defendant after granting a section 2255 motion when reimposing the original sentence would have resolved the constitutional problem. The court ruled that because section 2255 is silent regarding the scope of resentencing, there should be flexibility, and thus the district court could consider a departure "for any legitimate reason." 242 F.3d at 4.

power, the appellate court will "consider the totality of the record and the sentencing court's actions reflected therein." "We do not consider any single statement in a vacuum." Viewing the circumstances as a whole, the appellate court ruled that the sentencing judge knew that he had authority to depart in the case at bar, but chose not to exercise that power under the facts presented in the present case.

United States v. Olbres, 99 F.3d 28 (1st Cir. 1996). The district court erred in holding that the loss of jobs to innocent employees occasioned by defendants' imprisonment was categorically excluded as a basis for departure by USSG 5H1.2, which lists "vocational skills" as a discouraged factor for consideration in the departure decision. In reaching this conclusion the district court relied upon precedential case law, which viewed the Commission's policy statement as being based on the underlying principle that a sentencing judge may grant a departure given the defendant's ability to make work-related contributions to society only in extraordinary situations. However, the district court judge explicitly noted that, if the possibility for business failure were a legally sufficient basis for departure under the guidelines, he would make a departure sufficient to keep the business functioning. The circuit court reversed based upon the Supreme Court's reasoning in Koon v. United States, 518 U.S. 81 (1996). In Koon, the Supreme Court noted that if a special factor under consideration is a discouraged factor, the court should depart only if the factor is present to an exceptional degree or if the case in some way differs from the ordinary case. Categorical rejection of a particular departure factor is inappropriate, because Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance. A court, in deciding whether there exists an aggravating or mitigating circumstance of a kind or to a degree not considered by the Commission, should consider only the sentencing guidelines, policy statements and official commentary of the Sentencing Commission. With the exception of the factors courts may not consider under any circumstance, the guidelines do not limit the departure factors for unusual cases, because this would exceed the policymaking authority vested in the Commission. Further, the circuit court disagreed with the government's argument that the loss of employment to innocent employees falls within the meaning of "vocational skills." Given these conclusions and the court's desire to allow the parties to produce qualitative and quantitative evidence which may have been precluded by the district court's categorical approach, the case was remanded for further findings.

United States v. Padro Burgos, 239 F.3d 72 (1st Cir.), *cert. denied*, 121 S. Ct. 2259 (2001). The district court did not err when it declined to depart downward to resolve a disparity in sentences. The defendant had been convicted of conspiracy to distribute heroin and cocaine, in violation of 21 U.S.C. § 846, and of using a firearm in relation to a crime of violence and aiding and abetting, under 18 U.S.C. § 924(c)(1). The court sentenced the defendant to life imprisonment under USSG 2D1.1(d)(1), which requires the application of the First Degree Murder Guideline (§2A1.1) when deaths occur under circumstances constituting murder in violation of 18 U.S.C. § 1111. The defendant argued that the district court did not know that it had authority to depart downward to resolve the disparity between the life sentence imposed by the district court and the quantity-based sentence he would have received had no deaths occurred. Finding no evidence to show either that the district court was unaware that it had authority to depart or that it would have preferred to depart, the court rejected the defendant's argument and confirmed the life sentence. The district court never addressed the issue of a departure because the defendant never requested it. Moreover, the district court demonstrated no reluctance to impose a life sentence, commenting

that the life sentence would "serve both as a punitive factor against the defendant and as a deterring factor to those . . . that lack respect for life and for the law[]." *Id*. at 77. The sentence was affirmed.

United States v. Pelkey, 29 F.3d 11 (1st Cir. 1994). The district court erred in making an upward departure based on the victims' limited ability, due to their ages, to recover from the extent of their financial losses. Although the loss represented the victims' life savings, the victims' limited ability to recover from the financial loss, without more, does not present a repercussion so unusual as to take it out of the heartland of cases contemplated by USSG 2F1.1, Application Note 10. The "special vulnerability resulting from the age of the victims and their relationship with the defendant" had already been taken into account by the adjustment provided for vulnerable victims under USSG 3A1.1.

United States v. Pierro, 32 F.3d 611 (1st Cir. 1994), *cert. denied,* 513 U.S. 1119 (1995). The defendant was convicted of interstate transportation of stolen property and money laundering. The defendant appealed the district court's decision not to depart downward, arguing the district court incorrectly believed it lacked the legal authority to depart. The defendant argued that the district court should have departed downward because the only reason he laundered money was to further his underlying crime. The circuit court rejected this argument, holding that "Congress meant this statute [money laundering] to address, among other things, conduct undertaken subsequent to, although in connection with, an underlying crime, rather than merely affording an alternative means of punishing the underlying crime itself." Therefore, his reason for money laundering does not constitute an appropriate basis for departure. The defendant's next justification for a downward departure was that his offense was impermissibly "double counted" because the same money was used to compute the offense level for the money laundering offense and the interstate transportation offense. The defendant dealt in stolen property worth $2,500,000 and laundered $3,500,000 in profits from the resale of the property. The circuit court found that no impermissible double counting occurred; the defendant was merely being punished for these two activities separately. Lastly, the circuit court rejected the defendant's claim that the sentencing court should have departed downward because his sentence was disproportional to his offense as compared to other co-conspirators.

United States v. Portela, 167 F.3d 687 (1st Cir.), *cert. denied*, 1999 WL 700460 (Oct. 4, 1999) (No. 99-5795). The court did not err in finding that the government's reverse-sting operation against the defendant was not so unusual as to constitute grounds for departure. The court indicated that sting operations take place all the time and that there was no factual basis to support finding the defendant's case atypical. The court made appropriate findings and exercised its discretionary decision not to depart.

United States v. Rosales, 19 F.3d 763 (1st Cir. 1994). The appellate court affirmed the district court's decision to depart upward based on the defendant's numerous uncharged acts of similar misconduct. The "frequent and continuous" nature of the defendant's sexual abuse of children was uncontested. The court vacated and remanded the sentence, however, because the district court did not explain its reason for the degree (nine levels) of the departure. Without such an explanation, the appellate court could not evaluate the reasonableness of the nine-level departure.

United States v. Smith, 14 F.3d 662 (1st Cir. 1994). The defendant pled guilty to unlawful reentry into the United States following deportation. He challenged the district court's refusal to grant a downward departure. The defendant claims that his reliance on an INS notice that misstated the criminal penalty he would face if he returned to the United States constituted a mitigating circumstance the Sentencing Commission had not taken into account in formulating the guidelines. He argued that the district court believed that it lacked the authority to depart on this basis. The circuit court upheld the sentence finding that although this unusual circumstance was likely not taken into account by the Commission when formulating the guidelines, it is not the type of circumstance the sentencing court should consider to support a downward departure, as it runs counter to the purpose of the sentencing guidelines.

United States v. Snyder, 136 F.3d 65 (1st Cir. 1998). The district court erred in departing downward based on the disparity between the sentence the defendant would have received if convicted under state law and the sentence mandated under the Armed Career Criminal guideline. The court of appeals held that this was not a mitigating circumstance that took the case out of the heartland of armed career criminal cases and justified a downward departure. Nor was the trial court's concern for the unreviewable discretion of the United States Attorney in prosecuting the matter in federal court when it is proscribed by both state and federal law a valid factor on which to base a departure.

United States v. Twitty, 104 F.3d 1 (1st Cir. 1997). The district court did not err in granting an upward departure based upon both the large number of guns involved in the offense and the endangerment to public safety because the two are not duplicative. The appellate court rejected the defendant's argument that a penalty for endangerment to public safety was inherent in the guidelines and accounted for by the enhancement provisions, so that imposing an additional departure was "double dipping." The appellate court accepted the finding that this was an unusual case falling outside the "heartland" of the guidelines. The sentencing court was in a superior position to determine whether the defendant's responsibility for putting more than 225 serial number obliterated handguns onto the street warranted a more severe penalty than that called for under the enhanced sentencing guideline range.

§5K2.2 Physical Injury (Policy Statement)

United States v. Sanders, 197 F.3d 568 (1st Cir. 1999), *cert. denied*, 530 U.S. 1238 (2000). The district court did not err when it departed upward by 144 months under §5K2.2 based on significant personal injury to the victim. After shooting his girlfriend in the head, permanently disabling her, the defendant pled guilty to being a felon in possession of a firearm and of using of a firearm during a drug trafficking crime, in violation of 18 U.S.C. §§ 922(g)(1) and 924(c). As part of the plea agreement, the government did not pursue a state conviction for attempted murder. The defendant appealed the enhancement based on the absence of a full explanation and the unreasonable extent of the departure calculation, which significantly exceeded the mandatory minimum and nearly doubled the guideline maximum. Rejecting the defendant's first argument, the court noted the district court's comparison to state law, which resulted in a sentence three years less than the maximum state sentence for attempted murder, but four and one half years longer than a likely state sentence for the defendant's gun charges. With respect to the defendant's second argument, the court explained that while the departure was significant, it was not unprecedented.

See, e.g., United States v. Carrion-Cruz, 92 F.3d 5, 6 (1st Cir. 1996) (affirming a departure from 365 months to life imprisonment); United States v. Rostoff, 53 F.3d 398, 411 (1st Cir. 1995) (listing cases upholding departures up to 380 percent higher than the guideline maximums). Affirming the sentence, the court ruled that attempted murder combined with serious physical harm to the victim warranted such a significant departure. Moreover, while the 324-month sentence far exceeded the 235-month maximum sentence for second degree murder, the court stated that the discrepancy only demonstrates that there are different methods of measuring departures. "The concepts of 'reasonable' departure and 'abuse of discretion' reflect the reality that there are often a set of permissible outcomes available to the district court." *Id*. at 572. For example, one could argue that an analogy to the second degree murder guideline is too lenient because it does not account for the brutality of the defendant's actions, the victim's permanent injury, or the affect of her injuries on her family.[16]

§5K2.3 Extreme Psychological Injury (Policy Statement)

United States v. Pelkey, 29 F.3d 11 (1st Cir. 1994). The district court erred in departing upward based on the victims' psychological injuries. Although psychological harm is listed as a possible departure basis in USSG 2F1.1, Application Note 10, USSG 5K2.3 requires that the injury be a "substantial impairment" that is "much more serious than that normally resulting from the commission of the offense." Although all of the victims reported suffering a lack of trust, frustration, shock and depression, the evidence did not establish that the injuries were "so far beyond the heartland of fraud offenses as to constitute psychological harm within the meaning of the Policy Statement in USSG 5K2.3 or Application Note 10(c) to USSG 2F1.1."

[16]The defendant also argued that the 24-month increase at resentencing was unconstitutional. Despite a warning from the district court that it could result in a higher sentence, the defendant requested a resentencing after an intervening Supreme Court decision prompted the district court to vacate the defendant's conviction of use of a firearm during a drug trafficking crime. *See* Bailey v. United States, 516 U.S. 137 (1995) (defining use of a firearm to require active operation of the firearm during the drug offense). The district court had intended to strike the 60-month sentence imposed for that firearm conviction, which would have resulted in a 300-month sentence, 24 months shorter than that imposed at resentencing. However, because the current 324-month sentence does not exceed the original 360-month sentence, the district court did not violate the defendant's constitutional rights. Moreover, "this and other courts have permitted a new sentence to be calculated after one element has been eliminated, without treating *parts* of the prior sentence as a limit on the new one." 197 F.3d at 573; *see also* United States v. Townsend, 178 F.3d 558, 566-69 (D.C. Cir. 1999); United States v. Davis, 112 F.3d 118, 120-23 (3d Cir. 1997); Woodhouse v. United States, 109 F.3d 347, 347-48 (7th Cir. 1997). The court affirmed the sentence.

§5K2.11 Lesser Harms

United States v. Carvell, 74 F.3d 8 (1st Cir. 1996). The district court erred in concluding that USSG 5H1.4 barred a downward departure under USSG 5K2.11, the "lesser harms" provision. The facts indicate that the defendant used marijuana to cope with depression and to prevent suicide. Although finding that a reduced sentence under USSG 5K2.11 was warranted because the defendant was using marijuana to avoid the greater possible harm of suicide, the district court believed that USSG 5H1.4, which states that drug dependence is not a reason for a departure, precluded such a departure. The circuit court noted that USSG 5K2.11 is set forth in a different part than USSG 5H1.4, and USSG 5H1.4 is not intended to negate departures set forth in Ch. 5, Part K. The court noted that USSG 5K2.11 contains a limitation on the "lesser harms" provision that states that "[w]here the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted." Noting that the avoidance of suicide, rather than the drug use itself, drives the application of USSG 5K2.11, the circuit court stated that the interest in punishing drug manufacturing could be thought to be reduced in this case because the alternative to the defendant's drug use was suicide. The government urged that the classification of marijuana as a Schedule I substance under the Controlled Substance Act "evidences a legislative determination that marijuana `has no currently accepted medical use for treatment'" and, therefore, a departure is precluded. The circuit court rejected this argument, stating that such a classification does not bear on the question of whether the defendant acted "in order to avoid a perceived greater harm." The circuit court vacated the defendant's sentence and remanded for resentencing with the instruction that the defendant's sentence be reduced to the mandatory minimum of 60 months, instead of the 70-month guideline sentence.

§5K2.13 Diminished Capacity (Policy Statement)

United States v. Aker, 181 F.3d 167 (1st Cir. 1999). The district court erred in failing to state clearly the grounds for refusing to grant a downward departure based on diminished capacity. The record was confusing as to what standard the judge applied in denying the departure. Several times he stated that a USSG 5K2.13 departure was “discouraged” and certainly not “encouraged.” Because it was uncertain what standard the judge applied, the case was remanded to the district court for further consideration.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

§6A1.3 Resolution of Disputed Factors (Policy Statement)

United States v. Claudio, 44 F.3d 10 (1st Cir. 1995). The district court did not abuse its discretion in refusing to postpone the defendant's scheduled sentencing to hear live medical testimony relating to his family circumstances. The district court later offered to accept at the sentencing hearing a proffer of what the absent medical expert's testimony would have been. The circuit court, citing United States v. Tardiff, 969 F.2d 1283, 1286 (1st Cir. 1992), reasoned that

there is no automatic right to present live testimony at sentencing, and that testing the value of proposed live testimony by proffer—especially where a postponement would be involved—accords with "common practice and good sense." The circuit court concluded that none of the defendant's arguments showed that the proffer was inadequate in conveying the substance of the medical testimony.

United States v. Garafano, 36 F.3d 133 (1st Cir. 1994). The defendant was convicted in a jury trial of demanding and accepting bribes in violation of the Hobbs Act, 18 U.S.C. § 1951. However, the defendant was charged with multiple briberies and it was unclear whether the jury convicted him of all of the briberies or only one, and the dates of the conduct. The case was remanded for resentencing for the trial court to make an independent assessment of the trial evidence to determine the amount and dates of the bribes for sentencing purposes, to clarify the record.

APPLICABLE GUIDELINES/EX POST FACTO

See United States v. Rodriguez, 26 F.3d 4 (1st Cir. 1994), §2L1.2, p. 23.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

United States v. McDonald, 121 F.3d 7 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 725 (1998). The district court's failure to inform the defendant at his guilty plea that he faced a mandatory minimum sentence was harmless error because the defendant was sentenced to fifteen months longer than the statutory minimum, without reference to the statutory minimum.

United States v. Medina-Silverio, 30 F.3d 1 (1st Cir. 1994). The district court erred in its procedural application of Fed. R. Crim. P. 11. At the district court plea proceeding, the Rule 11 transcript of the defendant's plea proceeding merely incorporated, by reference only, the defendant's Petition to Enter a Plea of Guilty. On appeal, the defendant objected to the incorporation procedures, arguing that it was too simplistic for the purposes of Rule 11. The government responded to the defendant's objection by asserting that any error made by the district court was harmless in light of the fact that the defendant completed his Petition to Enter a Plea of Guilty with the assistance of counsel. The First Circuit disagreed with the government, and held that a "total failure to conduct the plea colloquy mandated by Rule 11 cannot be considered harmless error, even where writings evidence the defendant's apparent cognizance of the information which should have been imparted in open court." United States v. Bernal, 861 F.2d 434, 46 (5th Cir. 1988), *cert. denied*, 493 U.S. 872 (1989).

United States v. Moure-Ortiz, 184 F.3d 1 (1st Cir. 1999). The district court erred in departing downward from the sentence of 84 months called for by a plea agreement under Fed. R. Crim. P. 11(e)(1)(C). The defendant and the government entered into a plea agreement under Rule

11(e)(1)(C) in which the parties agreed to a sentence of 84 months imprisonment. The court accepted the agreement and the defendant pled guilty. At the sentencing hearing, the court departed downward based on the defendant's severe physical impairment and imposed a sentence of 63 months. Once the court accepted the 11(e)(1)(C) agreement, the court was without power to impose a sentence other than the 84 months term. The parties, both the defense and the government, are entitled to the benefit of the bargain. The district court must either vacate the sentence and sentence the defendant to 84 months or reject the agreement and allow the parties to come up with another agreement or go to trial.

Rule 35

United States v. Fahm, 13 F.3d 447 (1st Cir. 1994). The defendant appealed the district court's reconsideration and subsequent one-month increase of his original sentence 30 days after it had been entered. According to Rule 35(c), the sentencing court may, within seven days after imposing a sentence, correct the sentence where there was an arithmetical, technical, or other clear error. The circuit court, finding that the district court had no inherent power to reconsider its original sentence, held that because the maximum time allowed under Rule 35 had long since passed, the original sentence must be reinstated.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 924(c)

United States v. Shea, 150 F.3d 44 (1st Cir.), *cert. denied*, 119 S. Ct. 568 (1998). The district court did not err in instructing the jury that it could find the defendant guilty of the use and carrying of a firearm during and in relation to a crime of violence (attempted bank robbery) if it found that a co-conspirator's use of the firearm was a foreseeable act in furtherance of the conspiracy, pursuant to Pinkerton v. United States, 328 U.S. 640 (1946). The court of appeals held that a jury may be instructed on Pinkerton liability in connection with a charged violation of section 924(c) either as the sole or as an alternative theory of liability.

18 U.S.C. § 924(e)

See United States v. Fortes, 141 F.3d 1 (1st Cir.), *cert. denied*, 118 S. Cd. 2387 (1998), §4B1.4, p. 41.

POST-*APPRENDI* (*Apprendi v. New Jersey*, 530 U.S. 466 (2000))

United States v. Caba, 241 F.3d 98 (1st Cir. 2001). The defendant was convicted of five counts of drug trafficking, one of which involved crack cocaine. He was sentenced to 293 months, followed by an eight-year term of supervised release and acquitted on the crack cocaine count. The district court included the 143.7 grams of crack cocaine involved in the acquitted count as relevant conduct under USSG 1B1.3(a)(2) in determining the applicable sentencing guidelines range. Upon filing an information the government put the defendant on notice of its intention to seek a sentencing enhancement based on defendant's prior felony drug conviction, increasing his statutory maximum from 20 to 30 years. On appeal, the defendant argued that the *Apprendi* rule extended to increasing his sentence based on the district court's finding that the government had shown by a preponderance of the evidence that the defendant possessed crack cocaine as a part of the conspiracy. The court held that *Apprendi* did not apply to "guideline calculations (including, inter alia, drug weight calculations) that increase the defendant's sentence, but do not elevate the sentence to a point beyond the lowest applicable statutory maximum."

United States v. Duarte, 246 F.3d 56, 62 (1st Cir. 2001). Defendant's act of signing of a plea agreement in which the defendant accepted responsibility for a specified amount of drugs may have violated *Apprendi* but it also precluded the defendant from claiming prejudice either by omission of the drug quantity in the indictment or absence of the drug quantity in the jury's determination.

United States v. Eirby, 262 F.3d 31 (1st Cir. 2001). The First Circuit held that when a defendant is sentenced to less than the default statutory maximum for violating section 841(a), 20 years in prison, Apprendi is irrelevant. The defendant was convicted of conspiracy to distribute cocaine base and was sentenced to 66 months, after the district court made a downward departure from 120 months for defendant's substantial assistance. On appeal, the defendant challenged his sentence as an Apprendi violation arguing that the drug quantity determination, made pursuant to a preponderance of the evidence standard, exposed him to a higher mandatory minimum sentence and thus offended Apprendi. *Id*. at 35. The court found that the Apprendi doctrine offered no advantage to a defendant who was sentenced to a term less than the otherwise applicable statutory maximum. *Id*. at 37. The court concluded no Apprendi violation existed because application of section 841(b)(1)(B) provided a sentence of up to 40 years, and the district court actually sentenced the defendant to 66 months, a figure well below the statute's maximum. *Id*. at 39. *See also* United States v. Burgos, 254 F.3d 8, 15 (no Apprendi violation where defendant's sentence of 108 months fell within the statutory maximum of 20 years); United States v. Baltas, 236 F.3d 27, 41 (1st Cir. 2001) (no constitutional error occurred when the district court sentences the defendant within the statutory maximum, regardless that drug quantity was never determined by the jury beyond a reasonable doubt).

United States v. Flemmi, 245 F.3d 24 (1st Cir. 2001). Resumed grand jury proceedings led to the inclusion in the indictment of material that both added new RICO predicate acts and increased the maximum penalty to which the defendant was exposed. For a RICO violation the defendant would ordinarily be subject to a 20-year statutory maximum; however, if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment then the maximum available penalty for the defendant extends to life. The court held that the

measurement of the maximum penalty is restricted to those predicate acts charged in the body of the indictment.

United States v. Houle, 237 F.3d 71 (1st Cir. 2001). The First Circuit held that no Apprendi violation occurred when the district court sentenced the defendant within the statutory maximum, even though the drug quantity was never determined by the jury beyond a reasonable doubt. *Id*. at 80. The defendant was convicted of conspiracy to possess with intent to distribute and to distribute cocaine and sentenced to 160 months. *Id*. at 78. On appeal, the defendant argued that the district court erroneously imposed a sentence in excess of the lowest statutory mandatory minimum, and invited the court to read Apprendi more broadly to include mandatory minimums. *Id*. at 80. The court determined that the length of the defendant's sentence was based on the sentencing guidelines, and not by referring to the minimum sentence of 120 months provided by statute. *Id*. at 80. In support of its position, the court cited McMillan v. Pennsylvania, 477 U.S. 79 (1986) in which the Supreme Court authorized legislatures to increase minimum penalties based upon non-jury factual determinations, as long as the penalty imposed did not exceed the maximum range. *Id*. Because Apprendi expressly stated that McMillan was still good law, the court concluded that the increase in defendant's mandatory minimum did not implicate Apprendi because his sentence still remained within the statutory maximum. *See also* United States v. Lafrieniere, 236 F. 3d 41, 49 (1st Cir. 2001) (same); United States v. Barnes, 251 F.3d 251, 260 (1st Cir. 2001) (an incarcerative sentence of no greater than 20 years for importing, or conspiring to import, any quantity of cocaine falls below the default statutory maximum for such an offense and therefore does not violate Apprendi).

United States v. Nguyen, 246 F.3d 52, 56 (1st Cir. 2001). Enhancement under USSG 2B3.1(b)(2)(C) for possession of a firearm during commission of a robbery did not result in a sentence that exceeded the defendant's statutory maximum.

United States v. Terry, 240 F.3d 65 (1st Cir. 2001). The First Circuit held that a judge-finding of a prior conviction as a sentence enhancing factor did not conflict with Apprendi. *Id*. at 65. The defendant was convicted of distribution of cocaine, attempted possession with intent to distribute and conspiracy and was sentenced to 27 years' imprisonment. On appeal, the defendant challenged the calculation of his sentence based on the district court's determination of (1) his prior conviction for a drug offense, (2) the quantity of drugs involved in the conduct underlying the convictions, and (3) additional quantities of drugs involved in "relevant conduct for which he was not charged or convicted." *Id*. at 72. The court noted that 21 U.S.C. § 841(b)(1)(C) provided a statutory maximum of 20 years, regardless of the drug amount, except where there is a prior finalized conviction, in which case the statutory maximum would be 30 years. The court determined that defendant's sentence of 324 months, or 27 years, fell within the 30-year maximum sentence when there is a prior drug felony. *Id*. at 73. Citing Almandarez-Torres v. United States, 523 U.S. 224 (1998), in which it was held that "the use of the fact of a prior conviction in sentencing, where that fact was found by the judge rather than the jury, did not violate the right to a jury trial," the court concluded that Apprendi did not apply to the defendant's 27-year sentence. *Id*. at 74.